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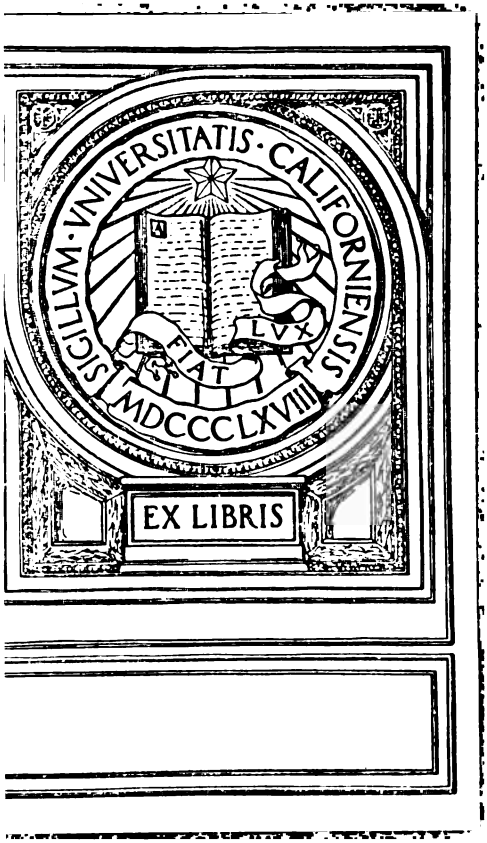
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MANUAL OF THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

MANUAL

OF THE

CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

By TIMOTHY FARRAR.

Veritatem
— — "expellas furcâ, tamen usque recurret." — HORACE.
"Litera scripta manet."

BOSTON:
LITTLE, BROWN, AND COMPANY.
1867.

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Entered according to Act of Congress, in the year 1867, by
TIMOTHY FARRAR,
in the Clerk's Office of the District Court of the District of Massachusetts.

CAMBRIDGE:
STEREOTYPED AND PRINTED BY
JOHN WILSON AND SON.

To MY DAUGHTER: —

The beloved memory of my mother, whose name you bear; and of your son, whose name was mine, and that of my venerated father, who aided the independence and constitution of his country, and taught me their principles; together with the sympathy and encouragement bestowed by yourself and husband during the progress of these labors, — entitle their result to be affectionately inscribed to

ANNA BANCROFT FARRAR CRANE.

TO THE

STUDENT OF THE CONSTITUTION.

THE formation and establishment of the American Union constituted the origin and result, the cause and the effect, the beginning and the end, of the American Revolution. By that Revolution, the British Empire was divided into two (not fourteen) independent nations. The Union first arose from the necessities of the "common defence." When these necessities were answered, it was found that international relations, and the interests of commerce, internal and external, were scarcely less peremptory in their claims to a similar provision for the "general welfare." The emergencies of war and of peace had thus united in demanding "a firm national governernment, . . . adequate to the preservation of the Union and the exigencies of government;" and, in answer to that demand, the people "ordained and established this Constitution for the United States of America."

The infancy of the nation, the sparseness of the population, the severe pressure of daily toil, the immaturity of our institutions, and the remoteness of neighbors, afforded a favorable opportunity for trying an experiment on the minimum of government, by which civil society could, under any circumstances, be maintained. The subsequent growth of the nation, the expansion of their domains, the collisions of intercourse, the complications of business, and the alternations of peace and war, at home and abroad, demanded, from time to time, a corresponding change in the operations of the government, and an adaptation of its machinery to constantly recurring new "exigencies."

The difference between a community of three millions of people, scattered along a narrow belt of sea-coast, inclosed by impenetrable forests; and thirty or forty millions, occupying half a continent, and pursuing all the objects, and by all the arts and means, which the reason or passions, the interest or ambition, the virtues or vices, of men could invent, — must soon make itself apparent in the inevitable development of those powers of regulation which were expressly designed and intended to provide for just such increasing claims for their exercise. At no period of our history has the trial of our insti-

tutions, and their adaptation to expand with the augmented demands of a great and increasing nation, been so thoroughly tested, and so cautiously and intelligently accepted, as during the late civil war, which can hardly yet be considered at an end.

It was in the midst of its events, and with a particular view to the practical operation of our government, under all the varieties of its circumstances, and to the principles on which the questions evolved by them have been or should be decided, that this treatise has been compiled. Its position in this respect is different from any prior exposition of the Constitution. The results of our marked experience should be noted and studied, as well to enable us to trace the footsteps of Divine Providence in the development of the destinies of a great people, as for the permanent use of those who may enjoy the future blessings of our institutions. In the hope of exciting the diligent attention of inquirers to ascertain and understand these results, the following work is submitted to their consideration.

MOUNT BOWDOIN,
June, 1867.

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CONSTITUTION

OF

THE UNITED STATES OF AMERICA.

We, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Section 1.

[1.] All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.

[1.] The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

[2.] No person shall be a representative who shall not have attained to the age of twenty-five years, and been

seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

[3.] Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and, until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4.] When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

[5.] The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

Section 3.

[1.] The Senate of the United States shall be composed of two Senators from each State, chosen by the

legislature thereof, for six years; and each Senator shall have one vote.

[2.] Immediately after they shall be assembled, in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[3.] No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States; and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

[4.] The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.

[5.] The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

[6.] The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief-Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

[7.] Judgment, in cases of impeachment, shall not

extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4.

[1.] The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

[2.] The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5.

[1.] Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

[2.] Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

[3.] Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

[4.] Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6.

[1.] The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

[2.] No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7.

[1.] All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

[2.] Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States. If he approve, he shall sign it; but, if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at

large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.

[3.] Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8.

The Congress shall have power, —

[1.] To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States:

[2.] To borrow money on the credit of the United States:

[3.] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes:

[4.] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States:

[5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States:

[7.] To establish post-offices and post-roads:

[8.] To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries:

[9.] To constitute tribunals inferior to the Supreme Court:

[10.] To define and punish piracies, and felonies committed on the high seas, and offences against the law of nations:

[11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

[12.] To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:

[13.] To provide and maintain a navy:

[14.] To make rules for the government and regulation of the land and naval forces:

[15.] To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions:

[16.] To provide for organizing, arming, and disciplin-

ing the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress:

[17.] To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings: — And

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION 9.

[1.] The migration or importation of such persons, as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

[2.] The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3.] No bill of attainder, or *ex post facto* law, shall be passed.

[4.] No capitation, or other direct tax, shall be laid,

unless in proportion to the *census*, or enumeration herein before directed to be taken.

[5.] No tax or duty shall be laid on articles exported from any State. No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

[6.] No money shall be drawn from the treasury, but consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[7.] No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign State.

SECTION 10.

[1.] No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

[2.] No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and

control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

ARTICLE II.

Section 1.

[1.] The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows: —

[2.] Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[3.] The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the

greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President; but, if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.

[4.] The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

[5.] No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

[6.] In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress

may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

[7.] The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

[8.] Before he enter on the execution of his office, he shall take the following oath or affirmation: —

[9.] "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.

Section 2.

[1.] The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

[2.] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers

and consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

[3.] The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

SECTION 3.

[1.] He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and, in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4.

[1.] The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1.

[1.] The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2.

[1.] The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects.

[2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed: but, when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3.

[1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[2.] The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1.

[1.] Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2.

[1.] The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

[2.] A person charged in any State with treason,

felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

[3.] No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3.

[1.] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress.

[2.] The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4.

[1.] The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

[1.] The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

[1.] All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.

[2.] This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; any thing in the constitution or laws of any State to the contrary notwithstanding.

[3.] The Senators and Representatives before mentioned, and the members of the several State legislatures,

and all executive and judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

[1.] The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath

or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by

jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII.

1. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one

of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in the ballots the person voted for as President, and, in distinct ballots, the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such a majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And, if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

2. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors

appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President. A quorum for the purpose shall consist of two-thirds of the whole number of Senators: a majority of the whole number shall be necessary to a choice.

3. But no person, constitutionally ineligible to the office of President, shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State,

excluding Indians not taxed; but, whenever the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof; but Congress may, by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States authorized by law, including debts incurred for the payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any State, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any

slave; but all such debts, obligations, and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MANUAL OF THE CONSTITUTION.

CHAPTER I.

POSTULATE.

§ 1. In entering upon the study of the Constitution of the United States, two principles should be firmly established in the mind of the student: first, that it is "the supreme law of the land;" and, second, that it constitutes a government for the purpose, and of course with the power and duty, of executing it. The first is proclaimed by the Constitution itself, in these precise words, and will not be denied or doubted.[1] The second rests on the same unquestionable authority, though more circuitously and indirectly asserted.

§ 2. It is a just principle, that "every government ought to possess the means of executing its own provisions, by its own authority."[2] There

[1] "We must either admit the proposition, or deny the authority." — *Webster.*

[2] Federalist, No. 80.

must necessarily be a constitutional mode of giving construction and efficacy to all constitutional provisions. The first three Articles of the Constitution provide for the three several departments of what it repeatedly calls "the government of the United States," assigning appropriate powers and duties to each. The executive department is expressly required to "take care that the laws be faithfully executed," including the Constitution itself, — the fundamental and "supreme law," — and all other law; and to make oath that he "will faithfully execute the office." The legislative department is authorized "to make all laws necessary and proper for carrying into execution" the powers vested in the executive or any other department of the government. The judicial department, or "the judicial power, shall extend to all cases in law or equity arising under this Constitution;" that is, from any action or omission of the Government or by its authority, and which may involve the meaning and construction of every sentence in the Constitution. As every power conferred necessarily involves a duty, here is ample provision made for the complete execution of every part and parcel of the Constitution. It does not cover the aggregate merely; but every word, sentence, and portion of it in detail, from "We, the people," to the end of Article VII., and all the Amendments.

§ 3. This duty of the government was first

directly promulgated by the convention who formed the instrument. In their resolution for putting the Constitution into operation, after providing for the choice of the first President and members of Congress, they say that they shall "proceed to execute this Constitution." It was recognized and acted upon by the first President and Congress, in the enactment of the first statute ever made under the Constitution. The sixth Article of the Constitution, requiring certain oaths to be taken by officers of the general and local governments, assigned no special duty to the government in general, or to Congress in particular, respecting its execution. Nevertheless, they made this statute for the express purpose of executing it; and it has been approved and practised upon, by all classes of the government and people, as long as the government has stood, and is still in force. The same duty has also been repeatedly exercised in the enactment of divers other laws, similarly called for, though not specially authorized, and expressly approved and sanctioned by the adjudications of the Supreme Court. A law is a rule of conduct, and a supreme law is above all other law. A law without a sanction is no law, and a rule neither followed nor retributed is void. Hence the necessity which compelled the American people to make in their government an agent, with power to execute the supreme law, and every part of it, — in the language of

the "Federalist,"[1] "a common government, with powers equal to its objects;" having constitutional power to give effect to all constitutional provisions.

§ 4. With these two important principles thoroughly imbibed, and constantly held in view, the true character of the Constitution, and the extent of the powers of the government, will be more easily investigated, and more readily understood. I enter into no analysis or vindication of these principles, because they are considered as purely elementary and fundamental; as incontrovertible maxims, if not self-evident truths, without which there can be no government. If the Constitution is not law, or if the government is not bound, has not the right and duty, to execute it, there is nothing left that is worth a discussion.

[1] No. 62.

CHAPTER II.

THE GOVERNMENT.

§ 5. The first clause of the Constitution is not only the first in the order of its arrangement, but the first in the importance and significance of its contents. It is a declaration of the authority by which it was made, the purposes for which it was made, the fundamental law by which these purposes are to be executed, and the country and nation to which they are applied. It is, in fact, the essence and epitome of the whole instrument, by which the government is ordained and created, and its purposes, authority, and duty established. It is in these comprehensive and emphatic words: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

§ 6. This enacting clause, though standing at the head, and being introductory to all the rest, was really one of the last that was incorporated in the Constitution. The circumstances out of which it grew, the accretions by which from time to time it was accumulated, the alterations and variations through which it passed in the process, and the time and manner of its incorporation in its present shape as a part of the instrument, are interesting facts in its history, and well accord with the importance of its present position as the leading, enacting, and most mandatory section of the Constitution.

§ 7. The principal materials out of which the Constitution was compiled, so far as they were not original with the convention, were found embodied, classified, and commingled with others, in at least seven different formal instruments. Saying nothing of the New-England Confederacy of 1643, the Albany Plan of Union of 1754, or the plan proposed by Dr. Franklin to Congress in 1775, there was, 1st, The Articles of Confederation of 1781, to which the attention of the convention was directly called by the terms of their appointment; 2d, A set of resolutions, introduced, on consultation with his associates, by Mr. Randolph, and called the Virginia Plan; 3d, A Constitution in form, drawn up by Mr. Charles Pinckney, and called the South-Carolina Plan; 4th, A set of resolutions, drawn up on consultation, and introduced by Mr. Pat-

terson, and called the New-Jersey Plan; 5th, Mr. Hamilton's draft of a Constitution in form, expounded by him to the convention in his speech of June 18, 1787; 6th, The first draft made under the orders of the convention by their Committee of Detail; and, 7th, The final draft made by their Committee of Revision. Each new draft had the benefit of the substance and of the discussion of all the preceding.

§ 8. The first sentence of the Articles of Confederation was in these words: "Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia." It was a mere naked title to the instrument, and proceeded "Article I." &c. to "Article XIII." The Virginia Plan was a set of resolutions, numbered one to fifteen, without title or prelude of any sort. The South-Carolina Plan was a draft of a Federal government, and began with these words: "We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the government of ourselves and posterity." The New-Jersey Plan,

like the Virginia, was a mere set of resolutions, numerically arranged, without title or prelude. Mr. Hamilton's draft began in these words: "The people of the United States of America do ordain and establish this Constitution, for the government of themselves and their posterity." The Virginia Plan was made the text for the proceedings of the convention for about two months, during which time it had been debated and altered, till the twenty-sixth day of July, 1787, when, in the form of twenty-three distinct resolutions adopted by the convention, it was referred to the Committee of Detail "for the purpose of reporting a Constitution conformably to the proceedings aforesaid." The South-Carolina and the New-Jersey Plans were at the same time referred to the same Committee, without being specially considered by the convention. After an adjournment for ten days, the convention received the report of the Committee of Detail, which formed a new text for the subsequent debates and proceedings of the convention.

§ 9. The first draft of the Constitution, as reported from this Committee by Mr. Rutledge, their chairman, followed the form and arrangement of the South-Carolina Plan, and, in many respects, the substance also; and this, not unfrequently, in preference to the resolutions which had already received the sanction of a vote of the convention. The question, how far the

journal copy of Mr. Pinckney's draft is strictly accurate, is not here entertained. For all the purposes of this general comparison, there can be no doubt but it is sufficiently so. Mr. Rutledge, as a member of the South-Carolina delegation, had acquiesced at least in the introduction of that plan which went by their name; and, as chairman of the Committee of Detail, had doubtless drawn their report, which he presented. These two facts would very naturally account for very many coincidences.

§ 10. In regard to the first sentence, which we are now examining, the Committee of Detail followed the South-Carolina Plan exactly. Between this and Mr. Hamilton's, besides minor differences, two very important ones will be noted. In the one, the people of the individual States, in their corporate capacity and by their corporate name, are the parties, and the ordaining and enacting power, — "We, the people of New Hampshire," &c.; and "the following Constitution," the object. In the other, "the people of the United States," in their corporate capacity and by their national name, are the sole parties, and the constituting and ordaining power, — "We, the people of the United States;" and "this Constitution," the object. The clause was adopted by the convention without opposition, as it was reported by the Committee of Detail in the words of the South-Carolina Plan; and, on the 8th of September following, went,

with the other articles agreed to by the convention, to the Committee of Revision, appointed "to revise the style of, and arrange, the Articles agreed to by the House."

§ 11. This committee was appointed by ballot, and consisted of Messrs. William Samuel Johnson, of Connecticut; Alexander Hamilton, of New York; Gouverneur Morris, of Pennsylvania; James Madison, of Virginia; and Rufus King, of Massachusetts. They were, individually, strong advocates of a "firm national government;" and, as a body, represented more power, wisdom, and statesmanship, than could have been collected in any other similar body from that convention, or probably elsewhere in the country. It is not to be presumed that such a committee was intended to be tied down to the mere duty of scriveners and copyists.

§ 12. In regard to this introductory clause, they departed entirely from the South-Carolina form, which had been copied by the Committee of Detail and accepted by the convention, and followed Mr. Hamilton's draft in the two particulars above mentioned, — "the people of the United States" and "this Constitution," instead of "the people of the [individual] States" and "the following Constitution;" and then substituted the words, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence,

promote the general welfare, and secure the blessings of liberty," in the place of the words, "for the government," &c.; defining the business and duties of the government, instead of leaving "the government" undefined. This very formal list of the designs and purposes of the people, and the objects and duties of their government for accomplishing them, has not been found in combination anywhere else.

§ 13. The leagues and confederacies among the colonies, or portions of them, adopted or proposed in the years 1643, 1754, 1775, and 1781, being mere treaties between political bodies or governments, generally endeavored to provide for "union" and "defence;" but, not being made by "the people" for their own benefit and government, said little about "welfare," and less about "liberty," and nothing about "justice" or "tranquillity." In this way the first sentence of the Constitution came into its present form. The substitution of this introductory and enacting clause, in the place of the titular prefix reported by the Committee of Detail, is a favorable specimen of the useful, beneficial, and liberal manner in which the duty of the Committee of Revision, in relation to "style and arrangement," was understood and performed. The change was entire, and must be presumed to have been made on account, and for the sake, of the bearing and effect it had on the character of the instrument in which it was inserted;

which was, of course, well understood by the committee.

§ 14. *First*, It made "the people of the United States," as a nation, the sole party, and the enacting authority of this fundamental law; instead of the several State governments, or the people of the several States, as distinct political bodies, as in the Confederation, in Mr. Pinckney's draft, and in the Constitution as reported by the Committee of Detail. This change has been represented as merely incidental, made only to accommodate another alteration, by which the Constitution was to go into operation when ratified by a part only of the States. Even if this were true, however, it would not alter the meaning or construction of the clause as it stands. It is an exact and plain declaration, that the instrument when adopted, and however it may be adopted, is the law of the land where it is adopted, and the work of its people. But the idea on which the suggestion is made has no foundation in fact. Both the draft of Mr. Pinckney, and the Constitution as reported by the Committee of Detail, which followed it so exactly in this clause and so substantially and formally in many others, contemplated a government independent of the unanimous consent of all the States, as decidedly as did Mr. Hamilton's. One of the States was not even represented in the Convention; and nobody was so sanguine as to expect the unanimous concurrence of the

whole thirteen before the inauguration of the experiment, if at all.

§ 15. *Second*, It specified, under six heads, all the purposes and objects which the people required to be accomplished by the administration and execution of their Constitution, covering all the duties of the most perfect government for the nation; viz., "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," — instead of saying, as in the former draft, "for the government of ourselves and posterity," without indicating the principles and objects by which it was to be guided, and the ends it was required to accomplish.

§ 16. *Third*, It "ordained and established this Constitution," including this introductory clause, making it a part of the supreme law of the land, instead of leaving it outside, as in the original draft, as a mere title or prefix to "the following Constitution," from which it was excluded.

§ 17. *Fourth*, It was "for the United States of America," — the whole nation exclusively, — and not for sections, states, or any component parts of the nation particularly. All its powers were conferred by the people themselves, to be exercised on themselves, for their own purposes, by their own authority, by their own agents, and for their own benefit.

§ 18. In reference to the broad declaration of this substituted clause, that the purposes of the people embraced nothing less than the "common defence and general welfare," it may be useful to bear in mind a few dates. These familiar words found no place in any part of the Constitution till September the 4th, just eleven days before the final order for its engrossment as amended. They then stood at the head of the section devoted to certain powers of Congress, in this precise form and connection: "to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare of the United States; to regulate commerce," &c., &c. Four days afterwards, Sept. 8, all the Articles agreed upon went into the hands of the Committee of Revision for a new draft. In four days more, Sept. 12, that committee reported the revised draft, leaving the beginning of the 8th section precisely as above written, with the exception of inserting the power "to borrow money," &c., above the power "to regulate commerce," &c.,[1] and altering the introductory clause as it now stands. Both were agreed to by the convention, so far as appears, without objection. Though they passed without opposition, it is evident they did not pass *sub silentio* and without examination, because the very minute criticism of striking out the sign of the infinitive mode (to)

[1] See 2 Story's Com. 871, and Journal of the Convention.

before the words "establish justice," was adopted by a divided vote of eight States against two. No other alteration in either was authorized by vote of the convention, before or after the engrossment, except to amend the first clause of the 8th section by adding the words, "but all duties, imposts, and excises shall be uniform throughout the United States." This was done on the 14th, the day before the engrossment.

§ 19. The clauses were not then numbered, as they have since been without authority; but the first clause, as now numbered, was divided by a semicolon and a break between the words "excises" and "to pay," in the same manner that the whole is divided from the next, and all the other clauses are, and then were, separated from each other. This part of the Journal was so defectively kept originally, and so mutilated afterwards, as to make it impossible to decide exactly what the vote was by which the last addition was made. Mr. Madison says the words "were unanimously annexed to the power of taxation."[1] If he may be supposed to have been precisely correct in his language, the vote was to insert the addition at the end of the first line, after the word "excises," so as to make the first clause read, "to lay and collect taxes, duties, imposts, and excises; but all duties, imposts, and excises shall be uniform throughout the United States:" leaving the words "to pay

[1] See 3 Madison Papers, *in loc.*

the debts, and provide for the common defence and general welfare of the United States," to constitute, as they did before, and as the words "to borrow money," &c., still do, a separate line or clause. Neither the words, the order, nor the punctuation were altered by any other vote of the convention; and it is perfectly manifest, from the promptness and unanimity with which it was made, without discussion or examination, that no thought was entertained of producing the least alteration in the force and effect of the clause as it stood before. If the addition was intentionally placed where it now stands, it involved the necessity of throwing the whole into one clause, as it now is; because the addition referred exclusively to the first line, and not at all to the second. In that case, the necessity, whether recognized by the convention or not, must govern the result.

§ 20. In this manner, "the common defence and general welfare" came first into the Constitution, as a part of the power of Congress, in the 8th section, on the 4th of September; and were afterwards repeated by the Committee of Revision among the great purposes and avowed objects of the people in ordaining the Constitution, and establishing the governmental machinery by which they were to be accomplished and executed. In both places and forms, they were unanimously accepted by the convention; and neither the printed Journal,

Madison Papers, nor tradition afford any evidence that they called forth a single disparaging remark, in regard to their substance or effect, from any member of the convention. In some of the State conventions, the words "We, the people," — the effect of which seems to have been well understood, — were made the occasion of discussing the great principle of a national Constitution, as distinguished from a Confederation. This question having been thoroughly discussed, and early settled in the general convention, was not again referred to in the adoption of this introductory clause. Neither was this clause discussed at all before the people.

§ 21. The Constitution, from the beginning, was placed on the defensive. A few general principles being well understood and thoroughly established, — such as the absolute necessity of union and government, &c., — it followed, of course, that the only plan proposed, or likely to be proposed, must be accepted, unless there were insuperable objections to it. The objections, therefore, became the prominent subjects of the discussion; and those parts of the Constitution which were overlooked by its opponents, or failed to encounter their maledictions, were neither developed nor expounded by its friends. This sentence was a mere substitute for one that never was adopted or intended to be *in*, or constitute a part of, the Constitution at all, and was not itself reported for a part of it till September

the 12th. It was then considered and amended on the 13th, by striking out two letters of no significance, and adopted unanimously on the 14th; and, on the 15th, the whole instrument had been re-examined, sentence by sentence, discussed, altered, amended, and accepted in detail, and the whole work completed by Saturday night, so as to be engrossed by Monday morning, when it was signed, and the convention forthwith adjourned *sine die*.

§ 22. Having thus escaped opposition in the convention, it excited little attention afterwards. Even the important fact that it was actually *in* the Constitution, and not left outside as its predecessors had been, and would become, if adopted, obligatory as a part of the supreme law of the land, does not appear ever to have been publicly alluded to by friend or foe. The able writers of the "Federalist," who made the fullest analysis of the Constitution, were always careful to remember, and uniformly cautious to perform, their duty as advocates. They never for a moment lose sight of the well-known nature and popular character of all the objections against which they were called upon to defend the Constitution. Their work, like all others in favor of the Constitution, is studiously defensive, and definitively apologetic throughout, and never indulges in the discovery or development of any powers or capabilities which had not previously been searched out, and made the occasion

of antagonistic discussion by its adversaries. Though the two principal authors of the work had been members of the convention and of the Committee of Revision, by whom this final draft had been made, and this sentence placed as the chief corner-stone of the Constitution; yet only two instances have been noted, in the whole work, where even the existence of this enacting clause is alluded to, notwithstanding the intimate connection of both with the precise form and peculiar manner in which it was substituted for the original one of a totally different character and purport. The first is in the 41st number, where Mr. Madison says, "Security against foreign danger . . . is an avowed and essential object of the American Union." That the "common defence" is an essential object and duty of the government, may be satisfactorily proved independently of this clause; but, as it is nowhere else actually "avowed" as such by the American people, the allusion is evidently to the words of this clause. The other instance is in the 84th number, where Mr. Hamilton, after reciting, under quotation marks, "We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain this Constitution for the United States of America," says, "This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State Bills of Rights." These

two allusions, though the only ones of their authors to the first clause of the Constitution, are sufficient to evince their appreciation of the magnitude and importance of its contents in the general fabric of the government.

§ 23. But it is always to be remembered, that the opinions and writings of individuals, committees, or conventions are not the Constitution. That was ordained and established by the people of the United States exclusively. What they meant and intended by it is the Constitution, — the fundamental and supreme law of the land, and is to be ascertained only from themselves, and by what they did; that is, by what they placed and left on record for the special purpose of making their meaning known. They meant exactly and only what they said; or, what is the same thing so far as others are concerned, if they meant any thing different, it can never be legally proved or known by anybody.

CHAPTER III.

WE, THE PEOPLE.

§ 24. LET us proceed to analyze this first or enacting clause. The first three words, "we, the people," announce the sole parties and agents by whom the law was ordained, and the authority and power on which it rests. The will of the people is the only source of human power, which neither invites nor admits of any vindication. All governments, however founded, ultimately resort to it for support, and must fail whenever they are repudiated by it. "Sovereignty resides originally in the people," says Burlamaqui. "The sovereignty or sovereign power, in every state, resides ultimately in the body of the people" (Sharswood's "Blackstone"). And Vattel says, sovereignty "is that public authority which commands in civil society. This authority belonged, originally and essentially, to the body of the society." Fraud or force, precedent or accident, may confer power, or sustain it for a season, under favorable circumstances, though established without right;

but, if not supported by the physical power of the last resort, must ultimately yield, whenever the will and power of the people are brought authoritatively to bear against it. This is the only absolute and inalienable sovereignty, — the controlling power in the last resort, under whatever form of government.

§ 25. The terms imply unity, — aggregate or corporate unity, — which, in the case of a whole people, is nationality. The unity or nationality of a whole people involves individuality, equality, and independence among the nations, and sovereignty or uncontrollable power in the last resort among themselves. These first words of the Constitution, therefore, "we, the people," authoritatively assume the integrity or unity, the nationality, independence, and sovereignty of the people. These ideas were none of them thought to require either elucidation, exhibition, vindication, or even assertion; but are quietly assumed and acted upon, in the simple formulary, "we, the people," which includes them all.

§ 26. The people, then, are a nation. They became such by separating themselves from the nationality of Great Britain, — first temporarily, in 1774, when they formed their Union, by which they became "one people," a body politic, though only for the single purpose of defending their rights and liberties, which they hoped and expected would be speedily accomplished, and then their former position resumed; afterwards

permanently, in 1776, by their Declaration of Independence, absolute and final. Under the former, they levied and carried on war; raised, equipped, and supported armies and navies; regulated commerce with foreign nations; suppressed among themselves the authority of the British crown and parliament; and performed many other acts of unequivocal nationality and sovereignty. By the Declaration of 1776, they confirmed their position as "one people," united, independent, and sovereign, and rendered it perpetual and irrevocable; absolving themselves "from all allegiance to the British crown," and dissolving "all political connection between them and the State of Great Britain;" and assuming "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do." Thus the "good people" became, by the formal act of their "Representatives in Congress assembled," in the language of the Declaration, permanently "one people," a nation, "a free people," "independent," and, of course, sovereign.

§ 27. The words, "we, the people," in the Constitution, re-affirm, in effect, all these particulars in the Declaration, — union, nationality, independence, and sovereignty. They, however, necessarily suggest the question, Who are the people? who constitute the nation? who are the actual members of the body politic, its

component materials? Prior to 1774, they were all his Britannic Majesty's subjects, inhabiting a certain locality, claiming the rights of native-born subjects, and all the liberties of the British Constitution; and were professedly governed as such. For the avowed and sole, but as they supposed temporary, purpose of a mutual defence of those rights and liberties, they became, by their own act, the "United Colonies of America." Under this organization and the authority of the Continental Congress, "the people" carried on a defensive war against the aggressions of Great Britain, and did all other necessary acts of independent nationality and sovereignty,[1] till 1776. On the fourth day of July of that year, by the "Declaration of Independence," the "Delegates of the United Colonies, . . . in the name and by the authority of the good people" thereof, became "the Representatives of the United States of America," and solemnly declared them to be "free and independent," and entitled to "do all acts and things" which other independent nations have a right to do; which necessarily includes all power, external and internal, implied in the absolute sovereignty of nations. In this manner they assumed permanently an equal station among the nations of the earth. The several constituencies, in their

[1] Nov. 1, 1775, Congress "Resolved that no produce of the United Colonies be exported . . . before the first day of March next, without the permission or order of this Congress."

separate local organizations, had authorized their respective delegates to unite in this general Declaration;[1] but none of them had ever intended to make, or attempt to maintain, such a declaration on their own individual account, or sought any independence of each other. They all united in this aggregate Declaration, "in the name of all the good people," of their independence of Great Britain, and all the world beside, but remained united among themselves; and so became permanently a body politic, an aggregate nation, and the separate colonies thereby subordinate portions of the new American State, as they had been before of the "State of Great Britain."

§ 28. Nothing would appear more reasonable or certain than that, by this act, the whole national sovereignty, the absolute right to govern in the last resort, the real succession to the British crown and government, descended and remained upon the people of the United States as a nation; and the component parts took and retained, as they had before, such subordinate position as suited the real sovereign to confer or acquiesce in. The separate colonies, or the individual states, do not speak, and are not mentioned in the Declaration; nor is the Declaration signed by delegates from the separate colonies, representing local districts, and binding their local constituencies, but is signed first by the President, and then by all the members promiscuously, in a mass, as the "Representatives of

[1] See note at the end of this chapter.

the United States of America," — the nation, as they announce themselves to be in the body of the paper; and the whole people are uniformly represented as "one people" acting together as a body corporate, — a nation, a "free people," — whom the king is "unfit" to govern. They dissolve their connection with Great Britain, and assert their "full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do;" which includes, of course, the establishment or continuance of subordinate institutions, and whatever else the British government had rightfully done, or any other legitimate government could so do.

§ 29. This was not only the theory of our system from the beginning, but the practice was in conformity to it, as well before as after our national position became permanent by the Declaration of 1776. Our local governments were all of them formed and administered, after the renunciation of the king's authority, by the express advice and sanction of the Congress, — first of the United Colonies, and then of the United States. Governments so formed could have no rightful power to act in derogation of the general sovereignty of the nation under which they were organized, any more than the present local governments could repudiate or counteract the Constitution and government of the United States, in subordination to which

only do they exist as political bodies, as governments, and by whose authority and power only they are sustained and defended.[1] Nevertheless they did so act, both under the Revolutionary government and under the Confederation, till the general government was well-nigh extinct from its own weakness, and the Union itself was at the point of absolute and final dissolution, — as it has more recently been for a second time from a similar cause, and will be very likely to be again, if an independent right to govern is accorded to the parts in opposition to the whole, instead of under and by virtue of the supreme law of the land, and in subordination to the paramount authority of the Constitution and laws of the United States. It was under such circumstances that the nation felt itself called upon and compelled to renovate and cement anew the perishing bonds of their inestimable Union.

§ 30. Who were "the people" at the time of the Declaration of Independence, was settled by act of the same Congress which made that Declaration. On the twenty-fourth day of June, 1776, they resolved, "That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony."[2] That "all persons" means every-

[1] "As if the rod should shake itself against them that lift it up."

[2] The Resolution of Independence, in the form finally adopted and embraced in the Declaration, was first moved in Congress, June 7, 1776. It was taken up for consideration the next day, June 8, and referred to

body, without distinction, requires no argument. That "abiding" here means permanently residing or inhabiting, is evident from the different provision immediately following, which relates to persons "passing through, visiting, or making a temporary stay in any of said colonies." This must have operated as a complete naturalization law for every person who then was, or afterwards became, an abiding resident of the country, whether born within the king's allegiance, or an alien of foreign birth. It applied equally to subsequent as well as prior inhabitants, because the object was to hold all such persons to the penalties of violated allegiance, in case they proved unfaithful to the Union. Such, doubtless, continued to be the law, until, under the Articles of Confederation, in 1781,[1] Congress practically relinquished their jurisdiction over

a Committee of the Whole. June 10, it was discussed in committee, passed, and reported to the House, where the further consideration of it was postponed to July 1; but, by way of preparation for its passage in the House, it was resolved to appoint a committee to draft a Declaration in form, to accompany it when published to the world. This committee was appointed the next day, June 11, and reported their draft, June 28, to the House. July 1, the Resolution and Declaration were considered together in Committee of the Whole; and debated and amended, day after day, till July 4, when they were finally reported to the House, agreed to, engrossed, and signed by the members. So that the Resolution of Citizenship, of June 24, was passed after the Resolution of Independence had been decided upon in Committee of the Whole, and was waiting the preparation of the formal Declaration for its final passage in the House.

[1] This Confederation was the work of the State governments; and, while maintaining their own separate sovereignty and independence, they nominally delegated to the United States in Congress assembled the principal rights and duties of sovereignty, and, at the same time, denied them the requisite powers for executing it.

the subject, and each State made its own rules of naturalization. How far this law was subsequently altered in any of the States, before the jurisdiction was again restored to the United States by the Constitution of 1788, has not been ascertained; but, obviously, all who acquired citizenship under it before it was repealed in any State (if it ever was so), all who were admitted under State laws, and all who had acquired citizenship by birthright in the land,[1] were members of the nation by and for whom the Constitution was made and adopted in 1788. It calls them repeatedly, "people of the United States," "people of the several States," "citizens of the United States," "inhabitants of a State," "citizens of different States," "citizens of each State," and "the people" generally, — meaning in every instance the same persons, who are called, in the Resolution of 1776, "members" of the body politic; and in the Constitution, Article I., Section 2, the "free persons," and "all other persons except Indians not taxed," according to whose numbers the representatives and direct taxes are to be apportioned.

§ 31. It was not the particular object of the Congress of 1776 to confer the *rights* of citi-

[1] "Every person born in the country is, at the moment of birth, *primâ facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the 'natural-born' rights as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race, color, or any other accidental circumstance." — Attorney-General Bates's Opinion on Citizenship, Nov. 29, 1862.

zenship, but it was their object to declare who should be liable to its *burdens* and *duties;* and, by doing the one, they incidentally did the other also, for the rights and duties must go together. So it was not the particular object of our Constitution (Section 2) to confer or to declare the *right* of citizenship; but it was their object to apportion the Representatives and direct taxes among the citizens, "the people of the several States," . . . "according to their respective numbers." And, in deciding who should and who should not be enumerated in ascertaining those "numbers," it necessarily decided who were and who were not those citizens, — "the people of the several States." Individuals cannot be citizens and not citizens at the same time. If they are citizens for the purpose of ascertaining the rights and duties of others, they are equally so for the purpose of settling their own. People and citizens are synonymous, and include all the members of the body politic, the representative body of the nation, "the people of the several States." "Free persons" and "other persons" are all persons, whatever may be the meaning of the word "free." If anybody can be excluded from both classes, it must be done by some governing principle of law, of sufficient force and extent to limit and control the obvious universality of the words used.

§ 32. It is said that aliens are excluded, because that, being citizens and owing allegiance

to a foreign government, they cannot perform the incompatible duties of allegiance to this. Besides, the government, being republican, must necessarily be in the hands of the people exclusively; and any participation of unnaturalized aliens in the rights of representation and suffrage would be inconsistent with the nature of the government. It is inconceivable that the American people should have intended to authorize unnaturalized foreigners, in any way, to augment or influence the representative power of any portion of the people; and it is equally inconceivable that they should have intended, in this way, to naturalize all such, and confer on them the rights of citizens, seeing they have expressly provided another mode for the purpose. It is therefore probably true that aliens cannot be counted, either as "free persons" or "other persons," in apportioning Representatives to "the people of the several States."

§ 33. It is also said that slaves are excluded, not because they do not belong here or do belong anywhere else, but because they are themselves *property*, and not *persons*, or capable of holding any personal right. Citizenship — membership of the nation, the body politic, being a component part of the people — is a franchise, a right conferred and guarantied, by the very existence of the nation, on all who compose it. "Every citizen of the United States is a component member of the nation, with rights and

duties, under the Constitution and laws of the United States, which cannot be destroyed or abridged by the laws of any particular State. The laws of the State, if they conflict with the laws of the nation, are of no force. . . . A citizen of the United States, whether by birth or naturalization, holds his franchise by the laws of the United States, and above the control of any particular State. . . . Whoever has that franchise is a whole citizen, and a citizen of the whole nation, and cannot be such citizen in one State, and not in another."[1]

§ 34. The people of the United States, in making their Constitution, do not create or confer on themselves any new rights, but they expressly reserve all the rights they then held, except what were delegated for their own benefit; and they particularly and expressly recognize and perpetuate many natural and civil common-law rights, which, of course, are placed beyond the reach of any subordinate government, and even of their own. Among these are the following: —

1. The right to be, what they call themselves, "the people of the United States," citizens, and component members of the body politic, — the nation; and to participate in all the privileges, immunities, and benefits the Constitution was designed to obtain or secure for all the American people, especially the right to be protected

[1] Attorney-General Bates's Opinion on Citizenship, Nov. 29, 1862.

and governed according to the provisions of the Constitution.

2. A right to the privileges and immunities of citizens in any of the several States. Among these is the fundamental and elementary right of suffrage. The Representatives to the national and State legislatures must be chosen by the people, the citizens (Section 2). Consequently, the citizens must choose them, and have a right to choose them.

3. A right to the common-law writ of *habeas corpus*, to protect the other common-law right, as well as natural and constitutional right, of personal liberty.

4. A right to trial by jury in any criminal case.

5. A right to keep and bear arms.

6. A right to life, liberty, and property, unless deprived by due process of law.

7. A right to just compensation for private property legally taken for public use.

8. A right to participate in all rights retained by, or reserved to, the people.

Most of these rights, with many others, belong by the Constitution not only to the citizens, — the people of the United States, strictly so called, by reason of the franchise of natural birth or otherwise, — but also to all persons who may be allowed to be and remain under the jurisdiction and protection of our government. These are a part only of the rights held by every

member of the nation, under and by virtue of the Constitution of the United States, independent of any other earthly power, and which, of course, "cannot be destroyed or abridged by the laws of any particular State." Who, then, in the United States is destitute of rights?

§ 35. A slave, being property, and incapable of holding any right, cannot, of course, be a citizen; because the franchise itself is incompatible with his condition, and, if he could hold it, would contradict his *status* as a slave. Slaves, therefore, cannot be citizens. The moment slaves or aliens are included in the catalogue of "people of the several States," and counted as a part of them, either as units or fractions, they become a part of the people, — citizens, and, of course are absolved from all the disabilities of alienage or slavery.

§ 36. But before any can be excluded on the ground of slavery, it must be shown that such a class, by virtue of constitutional laws, existed in 1788, and how it was composed, and that its continued existence since, under the Constitution of the United States, is compatible with its provisions, and how and by whom the class is now constituted.[1] As to aliens there can be no doubt; nor can it be doubted whether the people intended to naturalize them all in a body, by classing them with the citizens, and

[1] Since the adoption of the 13th Amendment, in 1865, of course no such question can arise.

reckoning them in the enumeration of the representative population, because they have made an express provision for doing it otherwise. The fact that none have ever been excluded from the enumeration by law, on the ground of slavery or being property, proves one of two things, — either that those called by that name never were rightfully and constitutionally property at all, but *persons*, as the Constitution calls them; or that, by being counted and reckoned according to law among "the people of the several States," — the citizens, — they are absolved from their former *status*, and made *persons*, equal as citizens with the others, among whom they are classed and counted in the enumeration of "the people of the several States."

§ 37. Besides aliens and slaves, who are necessarily excluded for want of franchise or right, "Indians not taxed" are excluded by express provision; because, belonging to their own native tribes, governed by their own ancient usages and laws, and not accepting our civilization or allegiance to our government, though within its jurisdiction and in some respects under its protection, it was thought right that they should not be subjected to the burdens and duties of membership of the nation, nor, of course, entitled to its rights and privileges. Being native-born inhabitants of the land, and as such having the best possible franchise therein, they must necessarily have been included in any proper

description of the people or citizens of the country, had it not been for the express exclusion.

§ 38. These are all the exclusions, express or implied. Origin, caste, color, descent, or any other distinction among men, has no effect here. Descendants of Europeans and Africans stand on equal ground; and those of Englishmen, Irishmen, Frenchmen, Dutchmen, Ethiopians, and Canadians, are all dealt with alike. If born or naturalized here, they are citizens; otherwise, they are aliens. The mode of classifying and counting them, under different names, and some as units and others as fractions, has no more effect on their natural rights, or on their civil, social, or political *status*, than it would to classify them as men, women, and children; counting the first as units, and the second and third two or three for one. They must all still be citizens; for they form a part of the representative body of "the people of the several States." The "people of the United States," therefore, are everybody belonging to the country, — that is, having a franchise, a right, as members of the body politic, — "free persons" and "all other persons," Indians only being specially excepted.

Note referred to, p. 51, *ante*. — The resolutions of the town of Malden, Mass., as copied in 2 Marshall's "Washington," 408, are a specimen of the action of the people on this subject. After saying what had been their feelings regarding their connection with Great Britain, they proceed, "But our sentiments are altered. It is now the ardent wish of our souls, that *America may become a free and independent state.*"

CHAPTER IV.

THE UNITED STATES.

§ 39. THE next words in the enacting clause of the Constitution are "the United States." They are used twice in this short sentence, with the words "of America" superadded in the last instance. They are the corporate name of the nation, and the local name of the country. As Great Britain forms the name of the kingdom and that of its principal island, and Russia the name of the empire and of the country over which it extends; so the United States is the name of the body politic, the nation, and of the country it occupies, and over which its government extends. The same name is used in the Declaration of Independence, as it is in this part of the Constitution, without any intimation how or of what it is composed, or that it includes a series of subordinate States or any other subdivisions. The assertion is, that the United States, the nation, the people occupying and controlling this land wherein we dwell, do, in their aggregate and corporate character, enact

this fundamental law for the government of the United States; the nation, the country, ourselves and our successors, being the owners and occupants of this good land.

§ 40. The emphatic idea is, that the Constitution was made for the nation, the whole nation, including all its parts; and not for the parts, combining them into a whole, — for the people, collectively and individually, in all their capacities and relations, whether personal, political, social, corporate, or otherwise. It is the Constitution for the whole; the fundamental and supreme law of the land. Individuals, societies, and corporations — commercial, political, and local — exist under it as they existed before it; but they are all subject to it, and dependent upon it for the protection of their natural rights and the foundation of their political rights. Though their political rights, in the form then legally approved, were, like their natural rights, anterior to the Constitution, yet, when that was adopted, it became paramount to, and the legal measure of, them all; and the local Constitutions and laws were to be construed and restricted by this supreme law. Any thing in any of them inconsistent with it was void. The present State constitutions were all made, or revised and re-enacted, under it, and designed, or should have been, to conform to it; but at any rate must be judged by it, and cannot counteract it. "The idea of a national government involves in it not

only an authority over individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government." . . . "In some instances . . . the power of the new government will act on the States in their collective characters." Local governments are not only useful and most valuable as schools of republican institutions and otherwise, but they are absolutely indispensable, and must have been instituted by the government, if not already provided. The national government could not get along without them. Mr. Madison says, "If they were abolished, the general government would be compelled, by the principle of self-preservation, to re-instate them in their proper jurisdiction;" or, he should have added, on the same principle of self-preservation, provide a substitute: either of which would be justified and required by it. All controversies respecting the jurisdiction of such subordinate governments must be ultimately decided by a "tribunal . . . to be established under the general government, . . . according to the rules of the Constitution," and acting under its laws.[1]

§ 41. It would have been impossible for any central government to manage all the minute interests of every petty locality in a great country. As such governments were necessary in some form, and as these were already formed, what could be more natural or desirable than

[1] Madison. — See Federalist, Nos. 14, 39, and 40.

to recognize and continue and guarantee the perpetual republican character of those organizations? Such constitutional recognition and consequent perpetuation of the existing divisions may have been hazardous, and liable to much doubt on the score of expediency; and accordingly we find that some of the most sagacious men in the convention were very desirous and sought diligently to avoid it: and our recent history has abundantly confirmed the sound wisdom and foresight which occasioned their fears and anxieties on the subject. It is still the most vulnerable part of our system; but its apprehended evils can best be guarded against by a liberal use of the actual powers and jurisdiction of the general government, attended, as it necessarily would be, by a corresponding diminution of the power and patronage, the expense and influence, of the subordinate local administrations. The Constitution gives them no power, and reserves none to them, and leaves nothing for their own people to give them, but such as the nation, "the people of the United States," have not delegated to their own government. The Constitution subjects the States politically (as bodies politic), and their officers officially (in their official capacity), as well as individuals personally, to divers important duties, which, of course, they are respectively authorized to perform; and the performance must be enforced, peaceably or forcibly, like all other lawful duties,

by the power which the nation has made responsible for the execution of all the laws.

§ 42. In a few instances it authorizes State action, with the consent, or subject to the ultimate control, of Congress; but of an independent right to govern in the last resort, which is supreme power, either local or general, the Constitution confers or recognizes none, in the State governments or anywhere else, except in the people and in the Constitution and laws of the United States, which are the only supreme law of the land. It really *reserves* nothing to them expressly of the power they before possessed, but the right to appoint the officers of the militia, and to train them according to the discipline adopted by Congress. No other power of final local administration was either given or continued, by express provision, to the States. The question in regard to State rights, which always mean State independence and State sovereignty, is between subordinate and co-ordinate governments, — whether the States, being within and parts of the United States, hold their separate political existence and powers by virtue of the Constitution and in subordination to its provisions, and of course bound to conform to it and sustain it; or whether they hold by sovereign right, above or co-ordinate with and independent of the Constitution, and of course authorized to act against it. In strictness, nothing is "reserved," or could be

"reserved" to the State governments that is entirely given away, "delegated," to the general government. This strictness would place a load upon the general government that they could not carry; and, of course, the construction has been to "leave" ("*leave*" is the word studiously used by the fathers of our government) the States to exercise such powers as are not prohibited to them, and which the general government, though authorized, decline or omit, for the time being, to exercise. It is on this principle that the States have been allowed, "left," to do many things that the general government might and perhaps should have done, and from which, if they had legislated, being the supreme power, the States would have been excluded. Where the United States have the right to legislate, they have also the right to exclude all interfering legislation.

§ 43. The powers not delegated to the general government, nor prohibited to the States, are reserved to the States or to the people. In the 10th Amendment, the words "States" and "United States" mean their governments respectively, as then organized: the people are the active governing power, the nation. What they then had, the State governments could continue to hold, under this reservation, as long as they retained their identity. But other States, or other governments in those States, could claim nothing under this clause. When the govern-

ments to whom this reservation was made were dissolved, and new ones had to be formed, the people who formed them could grant them nothing but what they then possessed, which certainly did not include any thing they had previously delegated to the general government. The people who had made the original State Constitutions could alter or supersede them, in whole or in part, as they pleased. By making the Constitution of the United States, which was done not only by the whole people of the United States, but by the majority of the people of each State also, they altered every State Constitution so far as to make it conform to the United-States Constitution, which they ordained to be the supreme or paramount law. What the whole nation had thus delegated to the general government, no particular State could re-grant to anybody, because it was no longer theirs to give. What was not granted to the general government remained with the grantees, the whole people of the nation, on general principles, as well as by the 10th Amendment; and this applied to what had been reserved to the original State governments as then organized, as soon as those governments were dissolved, whether new ones were organized in their place or not.

§ 44. But there is another principle available to any individual, or to any legally authorized association of individuals. Whatever violates

no law may be done according to law. Though the government may have ample power to regulate a subject in every minute particular, yet, if it makes no rule, every man is left to make one for himself, or to agree upon one with his neighbors, either in the form of State laws or otherwise. So it has been decided by the Supreme Court, that, although Congress has the entire power over "the subject of bankruptcies," yet, as long as they neglect to make any law on the subject, State laws in regard to it may be constitutionally executed, notwithstanding it is not a reserved power, but a positively delegated power, which, in its nature, must be exclusive; for a power cannot both be given away and retained at the same time. A special power may be reserved out of a general grant that would otherwise include it; but, in that case, the special power is excepted from the general grant, and never was granted.

§ 45. The effect of this principle is to allow the State governments to make what regulations they please, authorized by their own Constitutions, — provided they are compatible, and not inconsistent, with the Constitution and laws of the United States. The same is true whatever may be the extent of the powers of the government. If they may "promote the general welfare," and have plenary power and universal jurisdiction to regulate and command any thing and every thing that any legitimate government

could rightfully do; still, if they neglect any subject of which the State governments are not expressly or impliedly denied the cognizance, what but their own Constitutions can interfere with their action? The States, as well as individuals, have a constitutional existence, and a right to make laws as a government; and, of course, may make any laws that their own people, by their Constitution, authorize, — provided they do not contravene the Constitution of the United States, or any law made in virtue of it. This is the precise relation in which the States stand to the nation, the subordinate divisions to the whole. Whatever the Constitution and government of the United States lawfully enjoin is supreme law. Whatever the State governments do in contravention of it, or incompatible with it, is void; and what they do in accordance with it, if authorized by their own people, is constitutional and valid.

§ 46. But the idea that the Constitution or the people of the United States have appropriated any particular department of government, or any particular class of subjects, to the exclusive action and sole management of the local authorities, is entirely groundless. It organizes a government for the United States, the whole nation, and all its interests and people, individual and corporate, and makes it supreme over the whole land. Whatever this government cannot do or will not do, others may do if

unrestrained by national or State constitutions, or it may remain undone; but neither the local governments nor individuals can do any thing to obstruct, retard, or in any way counteract, the proceedings of the general government.

§ 47. A Constitution for the United States is a fundamental law for the whole country; and, if it is adequate to the exigencies of government, it is competent to all the purposes for which a good government is ever wanted. The efficiency of the government is all derived from the Constitution, and is equal in all places within the limits of the United States.[1] All its power is derived from the Constitution, and must be exercised in conformity to its grants and within its restrictions. It is not different in kind, or greater or less in degree, in one place than it is in another. It is supreme everywhere. It is exclusive where there is no subordinate government, and it is inclusive where there is one. It is temporarily exclusive where there may be another, till such a one is rightfully instituted; and it is permanently exclusive where

[1] "Does this term [the United States] designate the whole, or any particular portion, of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania." — By the Court, Marshall, C.J., in Loughborough *v.* Blake, 5 Wheat. R. 319.

"The exigencies of government" are all the exigencies of any government, — all the purposes for which government is instituted. A government adequate to these is a full and perfect government, whether with or without subordinates.

there can be no other. If a rightful subordinate becomes extinct, whether by right or by wrong, the general government again becomes exclusive till a new subordinate may rightfully resume the place.

CHAPTER V.

THE ENACTMENT.

§ 48. THE Constitution having thus described the agent, the people, the power that acts in this matter; and the nation, the United States, the people themselves in fact, on whose account, and for whose benefit they act, — it is proper that we next consider the authoritative action itself, which is there expressed by the words "ordain and establish." These words are of commanding or law-giving force, — mandatory in their nature. Under the Confederation, the Acts of Congress were styled "ordinances." The words are used in the Constitution, in other instances, in the same sense. They mean to legislate, enact, or decree. Congress, the legislative or law-making power under the Constitution, may "establish" rules and laws, post-offices and post-roads, by making or enacting laws, not otherwise. Offices are to be "established" by law. They may "constitute tribunals" in the same way; which is the same power given in another place, to "ordain and establish" courts. All these are done by enacting

laws. So the people, having the sole and absolute right and power to prescribe the rule and govern the land, "ordain and establish," enact and decree, and give authority and perpetuity to this fundamental and supreme law. When it is thus "ordained," it has all the force and efficacy which such ultimate right and power can confer, without appeal or other resort. When it is "established" in the same manner, it is as permanently fixed and settled as human power can make it. So the "Constitution of the United States," with its avowed purposes and objects, is the "supreme law" of the nation, adequately enjoined and "ordained," and permanently "established" by the "people" thereof. *Esto perpetua.*

THIS CONSTITUTION.

§ 49. After the action comes the subject-matter, the thing done,—"this Constitution," with its character and purposes. The word "this" makes it perfectly definite and inclusive. We have already noticed, that it is not, as in the original draft, "the following Constitution," or "a Constitution in manner and form following," thus excluding this enacting clause. But it is "this," — *ipsissimus*, — this whole instrument definitely, including this governing clause and all the rest. The entire instrument and all its parts is "this Constitution." A Constitution is a fundamental law, constituting, or instituting and

establishing, an authority or agency for the accomplishment of certain specified purposes. What does "this Constitution for the United States" do? Certainly it constitutes, or it institutes and establishes, an authority or agency for the express purpose, or "in order to" accomplish certain specified things. These things are the regular business, the appropriate duties, of a government, — "a firm national government, . . . adequate to the exigencies of government and the preservation of the Union." They are what nothing but a government can do. "They comprise," said Chief Justice Jay, "every thing requisite, with the blessing of divine providence, to render a people prosperous and happy;" and include all that any legitimate government can be required, or ought to be expected, to do. The authority and agency so established is therefore proved to be a government, by the subjects and duties assigned to it. They are all in the line of the duties of a government exclusively, require the supreme power and authority of a government, and involve the necessity of a perfect and entire government, co-extensive with the expressed purposes and designs.

§ 50. When the American people expressly avow such designs, as their true intention in the establishment of their government, and authoritatively ordain and establish it on that account and for that purpose, they most imperatively prescribe the duty of that government to pur-

sue and promote them. The prescribed duty of the government is the measure and end of their power. These objects and purposes, as here specified, are a mere paraphrase or substitute for the words used by Congress in calling the convention to form a "firm national government, . . . adequate to the exigencies of government and the preservation of the Union." Again, that the "Constitution" was designed to be a constitution of government for the United States, is manifest from the fact, that in the sequel they proceed to organize such a government, in detail, dividing it into appropriate departments, and assigning to each such portion of the duties of such a government as properly come within its sphere. Besides, the agency thus "ordained and established" by the "people of the United States" is repeatedly called, in divers places on the face of the instrument, "the government of the United States," in express terms.[1]

[1] Chief Justice Ellsworth said, in the Connecticut convention (2 Elliot, 190): "The Constitution is a complete system of legislative, judicial, and executive power; . . . and it will be found calculated to answer the purposes for which it was designed."

Washington wrote, Feb. 7, 1788: "With regard to the two great points, the pivots on which the whole machine must move, my creed is simply, — First, that the general government is not invested with more powers than are indispensably necessary to perform the functions of good government; and, consequently, that no objection ought to be made against the quantity of power delegated to it. Secondly, that these powers, as the appointment of all rulers will for ever arise from, and at short, stated intervals recur to, the free suffrages of the people, are so distributed among the legislative, executive, and judicial branches into which the general government is arranged, that it can never be in danger of degenerating into a monarchy or oligarchy, or any other despotic or oppressive form, so long as there shall remain any virtue in the body

§ 51. A Constitution made, ordained, and established for such purposes, and expressly "in order to" accomplish them, must therefore be a constitution of government "for the United States of America," with the duty, and of course the necessary right and power, "to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty." These are the express purposes, and the only purposes, for which it was made.[1] The ordinance of the American people is the law, the paramount law. The law imposes the duty, and the duty carries with it the power. Here, in this enacting clause, is the epitome and essence of the whole Constitution. Had it ended here, nothing would have been wanting but the details, specifications, limitations, and qualifications which the government itself could have supplied, if the people had seen fit to omit doing it for them. "There can be no doubt," says Mr. Madison, "that all the particular powers, requisite as means of executing the

of the people. . . . I will only say, as a further opinion founded on the maturest deliberation, that there is no alternative, no hope of alteration, no intermediate resting-place, between the adoption of this, and a recurrence to an unqualified state of anarchy, with all its deplorable consequences." —Writings, ix. 318.

Chief Justice Jay, in his address to the people of New York, in 1788, said: "A national government, competent to every national object, was indispensably necessary." — 1 Elliot's Debates, 496.

[1] In Cohens *v.* Virginia, 6 Wheat. R. 264, the Supreme Court, by Marshall, C. J., call "the powers confided to the Supreme Government, for these interesting purposes, ample;" that is, sufficient for them all.

general powers, would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law or in reason, than that, whenever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."[1]

§ 52. By authoritatively prescribing the purposes and objects to be accomplished, it regulates the magnitude and extent of the powers to be applied to them. The end and the means must be commensurate. If the government was actually formed for certain specified purposes, then the people, who formed it, required those purposes to be accomplished by it. They have appointed no other agent. If the government have no right to accomplish them, it is because the people had no intention that they should be accomplished. The assertion to the contrary is only a false pretence. To say that it was the express purpose of the people that a thing should be done, and yet that the government have no power to do it, is therefore a contradiction in terms. "The means," says Alexander Hamilton, "ought to be proportioned to the end; the persons from whose agency the attainment of any end is expected ought to possess the means by which it is to be attained."[2] It will not answer to represent the American people as guilty of the gross absurdity of saying, "We

[1] Federalist, No. 44. [2] Federalist, No. 23.

ordain and establish this Constitution, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, — meaning and intending thereby, that the government hereby created shall have no right to do any one of these things, unless a special power is hereinafter specifically delegated to some particular department, for each particular purpose." Yet this is substantially what has been often contended for.

§ 53. The expression of a particular *purpose* or *object*, in an act done or to be done, is not an unusual form, in our Constitution, of conferring a right or imposing a duty to accomplish that purpose. In the 8th section of Article I., the militia may be called forth, for the *purpose, in order* "to execute the laws of the Union, suppress insurrections, and repel invasions." Here is not only the power and duty to do these things, but the means by which they may be done. That the government is bound "to execute the laws, suppress insurrections, and repel invasions," and that, in the discretion of Congress, the militia may be used for the purpose, is here distinctly asserted. But, as the militia is the only means suggested and expressly placed at the disposal of the government for effecting these important objects, the doubt would seem to be, whether the government would have a

right to accomplish either of them in any other way, or to make use of any other means for the purpose. This doubt, I believe, never was expressed, and it is not likely that it ever will be.

§ 54. Mr. Jefferson construes the second line in the same section in the same manner, as a mere qualification of the power of taxation; in which he is undoubtedly right, unless "to pay the debts, and provide for the common defence and general welfare," are distinct substantive powers, which will be considered in another place. He says:[1] "To lay taxes to provide for the general welfare of the United States, is to lay taxes *for the purpose* of providing for the general welfare. Congress are not to lay taxes *ad libitum*, for any purpose they please, but only to pay the debts or provide for the welfare of the United States." But they may lay them for these purposes, or either of them, and apply them to the purpose. They cannot lay them for any other purposes, because there are none. These, and indeed "the common defence and general welfare," alone include every purpose for which the government, or any government, ever was instituted. The only doubt would seem to be, as in the other case, whether they are at liberty to accomplish the purposes by any other means than taxation. This doubt has been practically solved by the whole history of the government. Debts have been paid, and are

[1] Opinion on the Bank of the United States, Feb. 15, 1794.

still, by all the means by which the treasury is from time to time replenished, including borrowed money, and fines and forfeitures of criminals, much more than revenue from taxation. If other means than taxation had not been used for the "common defence and general welfare" during the late rebellion, the country would have found itself in a very different predicament from what it is to-day.

§ 55. Mr. Hamilton, in his Report on Manufactures, in 1791, said that the power to effect these objects by taxation, which was "granted in express terms," would not carry with it a power to do the same by any other means "not authorized in the Constitution." This implies that they might do it by any means which the Constitution places at their disposal; and, as this includes all the means "necessary and proper" for the purpose, it would be sufficiently extensive; and the practice of the government has been in conformity to it.

§ 56. By another clause in the same section, Congress is authorized "to promote the progress of science," &c., by granting patent rights. In other words, they may secure "to authors and inventors the exclusive right to their respective writings and discoveries," for the purpose, or in order, "to promote the progress of science and the useful arts." *Quære*, may they not promote the progress of science by other means than patent-rights? and may they not grant patent-

rights for other purposes than the promotion of science? It is believed that the government patronizes and promotes the progress of science and the useful arts much more efficiently and effectually, every day, by other means and measures under its control, than by their patent laws; and that their patent laws are made quite as efficient and effectual to replenish their library with books, their patent-office with curiosities, and their treasury with funds, as they are to promote the progress of science and the useful arts. At least, there is nothing in the Constitution to prevent their doing so if they please. Other clauses, of an analogous nature and in similar form, are contained in the Constitution; either ordaining means adapted to a particular object, or prescribing an object to be obtained by particular means. In which cases the end as well as the means, and the means as well as the end, are among "the powers vested by this Constitution in the government," and of course to be executed by any "laws necessary and proper" for the purpose.

§ 57. The Constitution is of the same character. This fundamental law was "ordained and established" for certain specified purposes, expressed on its face. The law and the purposes are parts of the same instrument, and together constitute the instrument. The government is the sole agent of the people for executing it; and is bound to execute it, and all and every part of it,

by the use of all the power placed at its disposal. The thing done, or to be done, and the end or purpose for which it is done, the means and the end, are both law, and must be executed as such. Any other construction would emasculate the Constitution, and cripple the government. It would deprive it of its adequacy to the exigencies thereof, and of its competence to execute and administer the supreme law or govern the country. If the people intended, as they say, that the "blessings of liberty" should be secured by the Constitution, they intended that the government they created "in order" to do it, should do it. If they did not intend the government should do it, they did not intend it should be done by the Constitution.

§ 58. The attempt to reduce the Constitution to such a condition of imbecility, and to induce a belief that such was its true character, has rested, in great measure, on the success of an effort to place this introductory or enacting clause entirely outside of the instrument. This effort has been made principally, and it may be said exclusively, by giving it a bad name. Unfortunately, the Constitution itself gives it no name. This circumstance has afforded great facility to those interested, to affix a euphonious name well calculated to answer their purpose. They have studiously called it a *Preamble*, and under that misnomer it has been generally cited. But the Constitution does not call it so, nor is it

so in fact. It has none of the characteristics, and answers none of the purposes, of a preamble; nor has it any resemblance to one, either in form or substance.

§ 59. The preamble to a statute, in the order of its arrangement, comes before the statute, — that is, before the mandatory part, or actual enactment, of which it constitutes no portion. A *pre-amble, walk-before* the law, is not in the law; forms no part of its mandate, or authoritative requirement. Its substance consists of a rehearsal of facts or reasonings, by way of inducement, supposed to show the fitness or propriety of the subsequent enactment. In form, it begins with a "whereas," and, after stating the matter of inducement, ends with "therefore," followed by the mandate, the law, "Be it enacted," &c.; as, "Whereas A, B, and C have humbly petitioned us to grant them leave, at their own proper cost and charges, to construct certain highly necessary and important public works, as hereinafter mentioned, entirely for the use and benefit of the public, and without any prospect, expectation, or even hope, of realizing the least benefit or advantage therefrom themselves; which humble request appearing to be just and reasonable; Therefore," be it, &c. This is just what the introductory clause of the Constitution is not. Here is no rehearsal by way of inducement, no manuduction, no "whereas," and no corollary requiring a subsequent command,

nothing preceding the supreme authority and the mandatory words: simply a naked ordinance, absolute and peremptory, "We, the people, ordain and establish."

§ 60. The real force and effect of a preamble is well stated in the following authorities. My Lord Coke says, "The rehearsal or preamble is a good mean to find out the meaning of a statute, and a key to the understanding thereof." Mr. Justice Buller says, "The preamble cannot control the enacting part of a statute which is expressed in clear and unambiguous terms; but, if any doubt arises on the words of the enacting part of a statute, the preamble may be resorted to to explain it."[1] Mr. Justice Story, in his "Commentaries,"[2] says, on this very passage, assuming it, without discussion, to be, as commonly called, a preamble: "It cannot confer any power *per se;* it can never amount by implication to an enlargement of any power expressly given."

§ 61. The enacting clause, as well as every thing following it, in a statute, is made law by force of the enactment. It is mandatory in its character, and in its form. It usually includes the substance, the essence, the epitome, of the whole statute; as, "Be it enacted by the Senate and House of Representatives, that there be, and hereby is, constituted and established a corporation, or body politic, consisting of the said A, B, C, their associates and successors, in order to lay

[1] 4 D. & E. 790; Willes, 395. [2] Vol. i. 445.

out and construct a railroad, for the transportation of passengers and merchandise through the populous and important agricultural and manufacturing region from Scamjessamin to Balleyhack." Here is the substance of the whole law, — the lawgiving authority, the commanding act, the subject-matter, and the purpose or object to be accomplished. The subsequent sections are mere detail, supplying the particulars of the manner of organizing the Company, its mode of action, &c., together with specifications, qualifications, limitations, &c., none of which may be essential to the existence of the corporation, or its power to effect the purposes of the law.

§ 62. To this the first sentence of our Constitution is the exact counterpart: "We, the people of the United States," is the lawgiving authority; "ordain and establish" is the mandatory action; "this Constitution for the United States" is the subject-matter; and "in order to form a more perfect Union," "secure the blessings of liberty," &c., are the purposes and ends to be accomplished thereby. To put all this out of the Constitution, by construction, is to decapitate it entirely. It would leave it only the fragment of a law; without a lawgiver, without an enactment, without a subject, and without an object. On the contrary, this first sentence is the principle and governing clause of the whole instrument. By giving it a bad name, it is attempted to thrust it out entirely. A preamble,

it is said, is no part of a statute. Therefore, by a misnomer, this summary and epitome of the whole Constitution is to be degraded from its most important position, as the first, most authoritative, and commanding portion of the instrument, to the performance of the mere secondary and insignificant office of a preamble; to be used, not as any part of the supreme law, but only by way of argument in the construction of some doubtful phraseology in other parts of the Constitution. This is doing no justice to the law, but great injustice to the people who made it. The enacting clause is perfectly authoritative in its source, — the people; peremptory in its action, — ordain and establish; definite and exact in its subject, — this Constitution; and distinct, broad, and extensive in its purposes and ends, embracing the "liberty, safety, and welfare of the whole Union, and all its people."

§ 63. This part of the Constitution being, like all the rest, the supreme law of the land, the ordained and established purposes and ends of the people in making it are to be accomplished thereby, if, consistently with the moral law and the principles of free government, they may be; and "the government of the United States," to whom it is committed for administration and execution, is responsible to the nation — the whole people — for the performance of the whole of them. The powers and duties of the government are not to be distinguished or separated;

nor to be held inadequate to the plenary accomplishment of the declared intentions, and peremptory purposes of the people of the United States.

CHAPTER VI.

THE PURPOSES.

§ 64. We will next consider the character and extent of these six express purposes, constituting the duties and limiting the powers of the national government under the Constitution. They are thus expressed in the first sentence of the Constitution: 1. "To form a more perfect Union; 2. establish justice; 3. insure domestic tranquillity; 4. provide for the common defence; 5. promote the general welfare; and, 6. secure the blessings of liberty to ourselves and our posterity."

FIRST,—A MORE PERFECT UNION.

§ 65. This has reference to the condition of the Union, as it existed in 1787, under the Articles of Confederation; which, by implication, it pronounces imperfect, and thereupon declares the purpose of forming one more perfect. Let us recur a little in detail to the process by which the independent nationality and sovereignty,

that on the division of the British empire fell to the American portion of it, became deteriorated. All the rights of sovereignty and governmental power, which had previously been exercised over them by the king and Parliament, or under the authority of either, having been abrogated, and allegiance totally abjured, remained with the new nation, to be used or disposed of by them, and in the mean time devolved inevitably upon the people. The people, for this corporate or national purpose, were one and indivisible. As it was necessary they should act, and as they could not act collectively, they must act by agents or representatives.

§ 66. Having no written constitution or other legal organization, limiting the authority of their agents, those whom the people chose to recognize as their representatives acted by a general and unlimited power, *in the name of the good people*, and exercised all their authority, sovereignty, and supremacy. It made no difference when, how, by whom,[1] or with what commissions, the representatives or agents were appointed, though most of these were sufficiently broad for any purpose whatever. Witness the following: In the Virginia Convention, June 20, 1776,

[1] None of them were appointed by any legal authority till after the organization of the States, certainly not by any under the king's government; and there was no other. Some delegates to Congress were appointed by conventions of citizens in small localities, as towns or counties; but few, if any, were appointed by any general convention, properly representing a whole colony.

"Resolved, that . . . Esquires, be, and they hereby are, appointed delegates to represent this colony in the general Congress, for one year from the 11th of August next." July 9, 1776, the Convention of New York authorized her delegates "to concert and adopt all such measures as they may deem conducive to the happiness and welfare of the United States." "Pennsylvania, in Convention, July 20, 1776, proceeded to the election of delegates to serve in the Continental Congress and chose for that service Dr. Benjamin Franklin," &c. "State of New Hampshire, in House of Representatives, Sept. 12, 1776, voted that . . . be, and hereby is, appointed a delegate to represent this State at the Continental Congress, one year next ensuing. In Council *eodem die*, read and concurred." Massachusetts, Dec. 10, 1776, expressly authorized their delegates to direct any measures "for prosecuting the war, concluding peace, contracting alliances, establishing commerce," and the rights and liberty of the American States; in fact, to do any thing which the Declaration of Independence alleged that independent nations could do.

§ 67. The appointing power itself had no other than a Revolutionary authority; and their acts, like those of their appointees, whether in form recommendatory or mandatory, were received and obeyed as laws, because they expressed the will of the people, and were accepted

and approved as such. In this manner the Continental Congress became and was the supreme power in the land. They exercised, in the name of the people, all the powers of a complete, independent national sovereignty, and were sustained and supported therein by the nation. Before the Declaration of Independence, they styled themselves the "guardians of the rights and liberties of the Colonies;" and were called, in the constitution of New Jersey, "the Supreme Council of the American Colonies." Chief Justice Jay said,[1] "To all general purposes, we have uniformly been one people; each individual citizen everywhere enjoying the same natural rights, privileges, and protection. As a nation, we made peace and war; as a nation, we have vanquished our common enemies; as a nation, we have formed alliances, and made treaties, and entered into various compacts and conventions with foreign States."

§ 68. Within the first month of their actual existence, as the organs of the Union, they resolved unanimously, "That, from and after the first day of December next (1774), there be no importation into British America, from Great Britain or Ireland, of any goods, wares, or merchandise whatsoever." Within a few days afterwards, they made and published a solemn Declaration of the rights and liberties of their constituents, which has never been revoked or

[1] Federalist, No. 2.

annulled. Among these is the following, which has been repeated and re-enacted, in all possible forms, up to the present time: —

"That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters and compacts, . . . are entitled to life, liberty, and property; and that they have never ceded, to any sovereign power whatever, a right to dispose of either without their consent." They also unanimously, in a form which they considered solemnly binding on themselves personally and their constituents, totally abolished the slave-trade, from and after the same first day of December, 1774.

§ 69. In 1775 the Provincial Convention of Massachusetts petitioned Congress for explicit advice "respecting the powers of civil government," declaring their readiness to "submit to such general plan as the Congress may direct for the colonies." Congress answered, June 9, by recommending them "to conform, as near as may be, to the spirit and substance of the charter, . . . until a governor of his Majesty's appointment will consent to govern the colony according to its charter." New Hampshire requested "the advice and direction of the Congress with respect to a method of our administering justice, and regulating our civil police;" and it was recommended to them to establish such a form of government . . . "as

will most effectually secure peace and good order in the province, during the continuance of the present dispute between Great Britain and the colonies." A similar course was taken with South Carolina and Virginia, before the adoption of the general Resolution of May 10, 1776.

§ 70. This Resolution — after a preamble reciting that the people have been excluded from the protection of the British crown; that their humble petitions are unanswered; that the whole force of the kingdom is exerted for their destruction; that it is against reason and good conscience that the necessary oaths for the support of any government under the crown should now be taken; that it is necessary that all authority under the crown should be totally suppressed; and that all the powers of government should be exerted, under the authority of the people, for the preservation of internal peace and good order, as well as for the defence of their lives, liberties, and properties against the hostile invasions and cruel depredations of their enemies" — is as follows: "Resolved, That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs hath been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in

particular, and America in general." By virtue of this resolution, all the other colonies organized their own local governments; and all of them, in some form, recognized the supremacy of the Continental Congress. The general government itself, however, as well as the local governments, was at this time considered as temporary only, during the contest for their liberties; but though temporary, yet, while it continued, it was supreme, absolute, and final.

§ 71. In June they settled the right of citizenship as follows, viz., "Resolved, That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or making a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same, allegiance thereto." A few weeks later, in order to induce foreigners in the British army to remain and "become members of these States," Congress ordered that all such shall be "invested with the rights, privileges, and immunities of natives, as established by the laws of these States." — "The Provincial Convention of New York was directed immediately to render Hudson's River defensible." They resolved, "That no bill of exchange, draft, or order of any officer in the [British] army

or navy . . . be received or negotiated, or any money supplied to them by any person in America;" "that no provisions or necessaries of any kind be furnished or supplied to or for the use of the British army or navy; that no vessel employed in transporting British troops be freighted or furnished with provisions or necessaries, until further orders from this Congress." Provisions were made for collecting saltpetre and sulphur, to be manufactured into gunpowder, for the use of the Continent;" and it resolved, "that the saltpetre and sulphur, collected in consequence of these resolves of Congress, be paid for out of the Continental fund."

§ 72. They appointed a "Commander-in-chief," and other officers, "of the Army of the United Colonies, and of all the forces now raised or to be raised for the defence of American liberty, and for repelling every hostile invasion thereof;" and adopted a body of "Rules and Regulations for the Continental Army." They established a Post, and appointed a "Postmaster-general of the United Colonies," and issued paper money or bills of credit in their name. They authorized and commissioned public vessels of war, and privateers; made a code of regulations relating to prizes and captures; and instituted courts for their adjudication and condemnation. They established "the Navy of the United Colonies," and made a code of "Rules for its

regulation." They authorized an attack on the British troops in Boston, "in any manner the General may think expedient, notwithstanding the town and property in it may thereby be destroyed." April 6, 1776, they made new regulations of foreign trade, and again prohibited the "importation of slaves into any of the thirteen colonies." Though some of these acts were in the form of recommendations, they were uniformly considered, treated, and obeyed as laws.

§ 73. All these, and many other similar powers of supreme sovereignty and nationality, were exercised by the Continental Congress, in the name of the people, while they claimed to be, and intended to continue, an integral part of the British empire, provided they could do it on terms compatible with their rights and liberties. But, on the fourth day of July, 1776, they cast off this temporary character of their government, declared the United Colonies free and independent States, and assumed, "AS ONE PEOPLE," a "separate and equal station . . . among the powers of the earth;" with "full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent States may of right do," including every power of distinct nationality and supreme sovereignty. Such was the Union in its origin, and such the rights and duties of its government, when the British

empire first became permanently and irrevocably divided. The American portion of it had as ample powers, in reference to themselves and their concerns, as the whole had possessed before, and as the European portion retained afterwards in reference to the remainder.

§ 74. In this Declaration, Congress announce themselves, and assume to be, the "Representatives of the United States," acting in the name and by the authority of the people. The colonies, individually, are not named in the instrument, nor is any one of them. The document does not purport to be the act of a number of aggregate communities, either as Colonies or States, but of the "Representatives of the United States, in General Congress assembled;" and was signed by them, not as delegates from the particular colonies, by whose people they had been elected and sent, but was signed by them promiscuously and individually only, as members of the "General Congress" of the United States.[1] This was not the imperfect Union, under the confederation or league, which the Constitution announces the purpose to make "more perfect."

§ 75. The disposition to fritter away the national authority was early noticed in the progress of the Articles of Confederation through

[1] The idea of voting and acting in Congress by States grew up after the State governments were organized, and out of their attempt to form a treaty or league of Confederation, which did not go into legal operation till 1781, when the war substantially came to a close.

Congress. They were reported in that body, in their original form, soon after the Declaration of Independence. As they were drawn up by the same men who had just signed that instrument,[1] it may well be supposed that they then exhibited something of the same spirit. "They were, in fact, but a digest, and even a limitation, in the shape of a written compact, of those undefined and discretionary sovereign powers which were delegated by the [people of the] Colonies to the Congress of 1774–75, and which had been freely exercised and implicitly obeyed. A remarkable instance of the exercise of this original, dormant, and vast discretion, appears on the Journals of Congress the latter end of 1776.[2] Congress transferred to the Commander-in-chief, for the term of six months, complete dictatorial power over the liberty and property of the citizens of the United States; in like manner as the Roman Senate, in critical times of the Republic, was wont to have recourse to a dictator, *ne quid republica detrimenti capiat.*"[3]

§ 76. They were, however, long held under the process of alteration and deterioration, under the name of amendment, mostly in committee, so that the progress of dilapidation does not appear on the Journal, though it is said to have been as rapid as it was effectual, till it

[1] They were, however, actually drawn by John Dickinson, who had perseveringly opposed the Declaration, and refused to sign it, even after it had been passed, under the instructions of his own constituents.

[2] Vol. ii. p. 475. [3] 1 Kent's Com. 198.

finally passed Congress, and was adopted by the State legislatures (1781) in the shape it retained when the Constitution was made; assuming the absolute sovereignty and independence of each particular State, with the retention of "every power, jurisdiction, and right which is not, by this confederation, expressly delegated to the United States in Congress assembled." This was sent to the several States in November, 1777, and was adopted by every State legislature by March, 1781, in "Articles of Confederation and perpetual Union," which assumed to confer the most important powers of national sovereignty on Congress, with corresponding restrictions on the States, and binding them to perpetual union irrevocably, and obedience in the premises; but without any executive or judicial authority, or other means of enforcing the smallest requisition of men, money, or measures. "The powers of Congress, as enumerated in the Articles of Confederation, would perhaps have been competent for all the essential purposes of the Union, had they been duly distributed among the departments of a well-balanced government, and been carried down, through the medium of a federal, judicial, and executive power, to the individual citizens of the Union."[1]

§ 77. The first constitution of Maryland, formed the next month after the Declaration of

[1] 1 Kent's Com. 199.

Independence (Aug. 14, 1776), declares, "that the people of this State ought to have the *sole* and *exclusive* right of regulating the internal government and police thereof;" and before the State government was organized, by virtue of this Constitution, adopted like all the rest under the auspices of Congress, the State convention passed "certain resolutions" respecting the raising of their allotment of soldiers, which seem to have been considered by Congress as an attempt at nullification; for they thereupon resolved "that the faith that this House, by virtue of the power with which they were vested, have plighted must be obligatory upon their constituents; that no one State can, by its own act, be released therefrom." The constitution of North Carolina, dated Dec. 18, 1776, contains the same Article above cited from Maryland. The constitution of New York, of 1777, reciting the exclusion of the inhabitants "from the protection of the British crown; the many and great inconveniences of their temporary government by [provincial] congress and committees;" . . . "the resolution of the Continental Congress recommending local governments to be established by the people of their respective colonies;" and their "Declaration of Independence," — deduces therefrom, that "all power whatever therein [in that State] hath *reverted* to the people thereof;" and then proceeds, "in the name and by the authority of the good people of this State,

[to] ordain, determine, and declare that no authority shall, on any pretence whatever, be exercised over the people or members of this State, but such as shall be derived from and granted by them."

§ 78. By the Massachusetts constitution of 1780, which, notwithstanding divers general revisions since the date of the Constitution of the United States, still remains, in this particular, unaltered, the people thereof declare that they are "a free, sovereign, and independent body politic or State, and have the sole and exclusive right of governing themselves, . . . and do, and for ever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them *expressly* delegated to the United States in Congress assembled." And the constitution of New Hampshire, of 1783, although perhaps justly considered one of the most loyal to the United-States government of any State in the Union, adopts the Article in the same words; and there they stand unaltered to this day, as taken in both instances from the Articles of Confederation. That system, instead of being a government of the people, for the people, and by the people, was merely a league or treaty between the different State legislatures, assuming to themselves sovereignty and independence, and was destitute of any sanction for its requirements. The State governments were

all formed under the auspices of the "United States in Congress assembled," and recognized, in some form, their position as component parts of the Union, and their subordination to its government. State legislatures, so situated, could not, by any combination, treaty, or league among themselves, augment the powers of each other, or transfer any that they legitimately possessed to another government; nor could they rightfully diminish those with which the circumstances and the acquiescence of the people had invested the Union, and by virtue of which the State governments themselves were inaugurated, sustained, and defended. Founded, constituted, and administered on such principles, the Confederation could be expected to come to no better end than, at the close of six years from its adoption, it short history shows. Though it was originally proposed by members of Congress, and by them transmitted to the State legislatures for their adoption, the United States are nowhere mentioned as a party to it, and, as a nation or independent body politic, never became such, by any formal act, either of the people or of their authorized representatives.

§ 79. Mr. Wilson, afterwards Mr. Justice Wilson, of the Supreme Court, said in the Convention of 1787, "Among the first sentiments expressed in the first Congress, one was, that Virginia is no more, that Massachusetts is no more, that Pennsylvania is no more, &c. We are now one

nation of brethren; we must bury all local interests and distinctions. This language continued for some time. The tables at length began to turn. No sooner were the State governments formed, than their jealousy and ambition began to display themselves. Each endeavored to cut a slice from the common loaf, . . . till at length the Confederation became frittered down to the impotent condition in which it now stands." It is not doubtful that a disposition early existed to view the general government as they had been accustomed to view the imperial government, as in some respect exterior, if not foreign, to themselves, and thus liable to distrust. This feeling did not arise, however, while Congress was the only authority on which they relied. It rapidly became chronic after the new governments, under the auspices of Congress, had been organized for the States. The interest principally affected by it, and the one on account of which it was studiously fostered and encouraged, was, and still is, the slave interest; as being adverse to the justice, liberty, and equal rights of the Declaration of Independence and of the Constitution. Mr. Wilson's short and plain statement of the actual result of thirteen years' experience of the Union, the last six years only being under the Confederation, is corroborated by almost every leading statesman in the convention. Mr. Madison said, in the same debate, "Experience

had evinced a constant tendency in the States to encroach on the Federal authority." Mr. Charles Pinckney said, "If the States were left to act for themselves in any case, it would be impossible to defend the national prerogatives, however extensive they might be on paper." Alexander Hamilton was of the opinion, that, "if the general government is too weak at first, it will continually grow weaker. The ambition and local interests of the respective members will be constantly undermining and usurping upon its prerogatives, till it comes to a dissolution." Mr. Wilson conceived that, "in spite of every precaution, the general government would be in perpetual danger of encroachments from the State governments.

§ 80. The authors of the "Federalist," in discussing the insufficiency of the Confederation, say:[1] "Facts too stubborn to be resisted have produced a . . . general assent to the abstract proposition, that there exist material defects in our national system; but [some], while they admit that the government of the United States is destitute of energy, . . . contend against conferring upon it those powers which are requisite to supply that energy. They seem still to aim at things repugnant and irreconcilable; at an augmentation of Federal authority, without a diminution of State authority; at sovereignty in the Union, and complete independence in the mem-

[1] No. 15.

bers. They still, in fine, seem to cherish, with blind devotion, the political monster of an *imperium in imperio*." Mr. Justice Story says,[1] "The States notoriously disregarded the rights and prerogatives admitted to belong to the Confederacy; and even the requisitions of Congress, for objects unquestionably within their constitutional authority, were openly derided or silently evaded."

§ 81. This brings us to a consideration of the remedy adopted by the PEOPLE, which was, "to form a more perfect Union;" *in order* to which they "ordain and establish this Constitution," creating what they call "the government of the United States." The Constitution of the government, then, was the means, by the legitimate operation of which they intended to "form a more perfect Union." We have seen that the imperfect Union under the Confederation, which of course they intended to avoid, was a mere treaty or league of nominally independent States, without power to control its own members, or the means of reaching the individuals composing them. The "more perfect Union," therefore, to be formed, must be the reverse of this in both respects. It must be the "supreme law of the land," controlling all its constituent parts and members, whether individual or corporate. "The idea of a national government involves in it not only an authority over indi-

[1] 2 Com. 375.

vidual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government." — "In some instances, . . . the power of the new government will act on the States in their collective characters."[1]

§ 82. Mr. Hamilton told the Convention,[2] "The general power, whatever be its form, if it preserves itself, must swallow up the State powers. Otherwise, it will be swallowed up by them. . . . Two sovereignties cannot co-exist within the same limits." The same sentiment was expressed by several of the most distinguished members of the Convention, and questioned by none. So far as appears, it was accepted by all. In the Virginia Convention, June 12, 1788, Mr. Grayson called it "a political absurdity to suppose that there can be two concurrent legislatures. . . . . Must it not strike every man's mind, that two unlimited, co-ordinate, and co-equal authorities, over the same subjects, cannot exist together?"[3] Accordingly, we find that such *supremacy* is the character of the Constitution and of the government it creates, as given in its own words, on the face of the instrument. Such a government, faithfully administered according to the spirit of its formation, is fully adequate, at least, to this first and important purpose of its

[1] Madison in the "Federalist." See Nos. 89, 40.
[2] Speech of June, 1787. [3] 3 Elliot's Debates, 284.

creation, "to form a more perfect Union." It must necessarily form it, and preserve it, as long as it remains or is capable of preserving its own existence, and defending its own prerogatives.

§ 83. The contemplated "more perfect Union" was a union of the people of the United States among themselves. They are the only parties mentioned or alluded to in this part of the instrument. No individual State is mentioned or indicated as a party, or has any claim to be so considered. That this was well understood by the friends of the Constitution is manifest from its terms, as well as by the reasons given for its adoption. That it was also understood by its opponents is equally manifest, from the spirit and manner in which its adoption was originally resisted, and by the altered form which the authors of the late Rebellion have given to the parallel portion of their own constitution. They say: "We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government," &c., "ordain and establish," &c.; thus changing the whole character of the instrument, and carrying it back to the very imperfect union for which our fathers intended to substitute one "more perfect," such a Union as would make them what the Declaration of Independence had pronounced them to be, "one people," with all

the rights and powers of other independent nations.

§ 84. The intention to do this was well expressed by the Congress of the Confederation, in calling the Constitutional Convention to form "a firm national government," . . . "adequate to the exigencies of government and the preservation of the Union." The Convention itself expressed the same idea in their first resolution thus: "That a national government ought to be established, consisting of a supreme legislative, executive, and judiciary;" and, lastly, the people of the United States said the same thing, by ordaining and establishing just such a government. The authority of a common and adequate supreme power, to guard rights and prevent wrongs, is of itself a perfect and perpetual bond of union, — not a union between other parties not named, but between the people themselves. This is the Union that a single national government makes and perpetuates. A confederate government between States is a treaty or league. A "perfect Union" among a people is a nation. The difference is no more plain and palpable on the face of the two instruments, than it is and always was thoroughly understood by all the parties concerned. Chief Justice Jay remarked,[1] "Not only the first, but every succeeding Congress, as well as the late Convention, have invariably joined with the

[1] Federalist, No. 2.

people in thinking that the prosperity of America depended on its union. To preserve and perpetuate it was the great object of the people in forming the Convention, and it is the great object of the plan which the Convention has advised them to adopt;" and, after it was adopted, he would have had the authority of the Constitution for adding, "It was a great object of the people of the United States in its adoption;" for so they say in this enacting clause.

§ 85. The first dilapidation from the original principle of national unity, afterwards sanctioned in the Declaration of Independence as "one people," to the destructive doctrine of State sovereignty and independence, was retraced or retracted, and disavowed by the people, in the formation of the Constitution. The second substitution of State rights or State sovereignty, for the supremacy of the constitutional government of the United States, has cost the nation the blood, treasure, and desolation of a four years' rebellion and civil war. The third, if it shall now be inaugurated as proposed, by subjecting the "life, liberty, or property," the "defence, welfare," and happiness, of persons owing allegiance to, and entitled to the rights, privileges, and immunities of natural-born citizens of the United States under the Constitution, to the tender mercies of a privileged class of local taskmasters, acting in the name of State rights or otherwise, will terminate

in a more disastrous penalty, which, though we may escape, we shall not escape the unutterable disgrace of leaving as a cruel legacy to our children.

CHAPTER VII.

ESTABLISH JUSTICE.

§ 86. THE second avowed purpose of the American people in ordaining their Constitution was to "establish justice." This may be said to be an ultimate object of all government. It includes the doing justice themselves among the nations, their peers, and to their subjects and subordinates; requiring and administering it among all people within their jurisdiction, in their intercourse with each other, and preventing or punishing every species o injustice. No human government can be expected to accomplish all this, any more than any thing else, perfectly. Not even the divine government so does it in this imperfect world. But civil government is the divine ordinance for making the effort among men; and the human government that makes the nearest approach to its accomplishment comes the nearest to answering the purpose of its creation. The annunciation, on the face of the Constitution, that the establishment

of justice is the purpose of the people of the United States in ordaining the government, places justice itself at the foundation of the fabric, and prescribes, as a duty, that the whole administration of it should be on that principle. Neither the people nor their government, to be sure, have any rightful power to authorize injustice; but this is very different from a positive ordinance to establish justice. This requires justice universally, and with the requirement supplies the means and the power to execute it, to the extent of the region over which they rule.

§ 87. "Prior to the date of the Constitution, . . . the United States had, by taking a place among the nations of the earth, become amenable to the law of nations; and it was their interest, as well as their duty, to provide that those laws should be respected and obeyed. In their national character and capacity, the United States were responsible to foreign nations for the conduct of each State, relative to the law of nations and the performance of treaties; and there the inexpediency of referring all such questions to State courts, and particularly to the courts of delinquent States, became apparent. While all the States were bound to protect each, and the citizens of each, it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done to each and the citizens of each, but also to

cause justice to be done by each, and the citizens of each; and that not by violence and force, but by a stable, sedate, and regular course of judicial procedure."[1]

§ 88. Notwithstanding it thus places justice as the foundation of the government, and requires it to be administered on that principle, much pains has been taken to prove that it nevertheless actually authorizes or recognizes absolute injustice. To establish this, three different clauses of the Constitution have been cited as showing an infringement of the inalienable rights of man, in allowing one man to acquire an ownership or right of property in another, and so admitting of absolute chattel slavery. The first is where the people are divided into classes, for certain purposes, under the names of *free persons* and *other persons*. The second is where Congress is restrained temporarily from interfering with the migration of persons. And the third is where persons held to service or labor, and escaping, are required to be returned. That neither nor all of these do any such thing as is charged, is elaborately shown elsewhere. It is only necessary to remark here, that none of them authorize any injustice, or recognize any such right as is supposed. It is not known, that any other parts of the Constitution have ever been relied upon to show that it violates the sound principles of

[1] Per Jay, Chief Justice, in Chisholm *v.* Georgia, 2 Dall. Rep. 419.

justice and moral right, which it inculcates and professes to establish.

DOMESTIC TRANQUILLITY.

§ 89. The third great purpose, which the American people constitute their government to effect, is to "insure domestic tranquillity." This is done by the certainty and efficiency with which justice is administered and enforced among men, and every species of wrong and injustice is suppressed or punished, making all persons secure and safe in the possession and enjoyment of their rights, and removing all inducement to riot, tumult, and aggression, by taking away all possibility of their success. The same means and the same authority that establish and maintain justice in the land, make the people tranquil, contented, and happy in the pursuit and enjoyment of their own rights, without motive or inducement to agitation or insurrection, and without an excuse for individual malice to attempt the gratification of personal retaliation or revenge. All the powers of the Constitution that require and enable the different departments of the government to administer it with justice and equity, and especially all the powers of the judiciary that enable them to administer the law on the same principles between man and man, tend directly to the accomplishment of this part of the

design of the American people, and of course to enable the government to fulfil this great duty devolved upon them, — to insure domestic tranquillity.

CHAPTER VIII.

THE COMMON DEFENCE.

§ 90. The words "common defence and general welfare" were not inserted in any part of the Constitution till Sept. 4, 1787, just ten working days before the labors of the Convention were finished. They were then reported by the "grand Committee," appointed on motion of Mr. Sherman, and of which Mr. Brearley was chairman, as they now stand with the rest of the second line of the 8th section of Article I.; and adopted in the same form by the Convention, on the same day, *nem. con.* Four days after, Sept. 8, the whole work of the Convention was sent to the Committee of Revision, "to revise the style and arrange the Articles" agreed on. They reported the final draft, with the 8th section as it now stands to the end of the second line, and with these important words also added to the new or amended draft of the introductory or enacting clause, on the 12th. On the 14th, the Convention added, after the words "general welfare" in the 8th section,

the third line on *uniformity* as it now stands; having, on the 13th, approved the revised draft of the enacting clause, without objection. On Saturday, the 15th of September, the Convention completed their re-examination of the whole draft of the Committee of Revision. They had taken up every clause in detail; altered, amended, or approved of each one particularly; then adopted the whole generally; and sent it to the proper clerk for engrossment. On Monday, the 17th, they signed it as engrossed, and dissolved the Convention.

§ 91. The fourth purpose, in the order in which they are placed, for which the American people established their government, was "to provide for the common defence." — "Safety," says Mr. Jay, "seems to be the first object." . . . "The safety of the whole is the interest of the whole, and cannot be provided for without government."[1] This may be said to be the most important object of the people, and the first, most obvious, and most imperative duty of the government. It is, in fact, the one on which the value of all the others depends. If a nation cannot defend its own existence, in the possession of its own prerogatives and rights, it is of little consequence what those rights are, or how else they may be estimated and regarded. This, therefore, is an object of primary necessity for every nation, and a primary duty

[1] Federalist, Nos. 3, 4.

for every independent and supreme government, however that government may be constituted and organized.

§ 92. Our Constitution rightfully gives it this prominent place among the avowed purposes of the people, to be accomplished by their government. The necessity and duty being imperative; the magnitude of the obstacles to be met and overcome, indefinite and unknown, — the power to meet them, in order to be commensurate, without which they are worthless, must be broad and unlimited, co-extensive with all the resources of the nation, moral and physical, present and prospective. "It is in vain to oppose constitutional barriers to the impulse of self-preservation."[1] — "Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continued danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their political rights. To be more safe, they at length become willing to be less free."[2]

§ 93. In this view, the words of this part of the Constitution are peculiarly apt and well chosen, — "provide for the common defence."

[1] Madison, Federalist, No. 41. [2] Hamilton, Ibid, No. 8.

They include not merely the making defence when called for, — all the powers, demands, and appliances of actual war, when it comes, — but the providence necessary to anticipate and secure, in times of profound peace, the appropriate means for making the defence effectual when wanted; — not only collecting and preserving all kinds of warlike implements, but cultivating and securing the raw material for the same, above ground and under ground, — the forest-trees and minerals, together with the science necessary for nurturing and working them; — not only fostering and encouraging the profession of soldiers and sailors, but establishing and maintaining permanent institutions of learning and science for disciplining and educating, in adequate numbers, the youth of the land, for future officers and men of war by sea and land.

§ 94. It is not a little singular, that this great and really unlimited power of national defence should have been, from the origin of our government, universally admitted in theory, and practically used, so far as the principle is concerned, to the extent of its whole length and breadth; and yet that its source in the Constitution has never been generally admitted, if indeed it has often been sought or discovered. It has not been admitted to be in this part of the instrument; because, it is said, this is only a preamble, and can confer no power itself, or even enlarge any

power otherwise conferred, but is essentially outside of the Constitution, and no part of the supreme law of the land. It is said also that it is not in section 8 of Article I., — the only other place where the words "provide for the common defence" occur, — because the sole object of that clause is to confer on Congress the power of taxation, or, as some say, that of taxation and appropriation; either of which excludes from it any more general power of national defence, than such as may be made by the use of a revenue derived from taxation. It certainly is not in any other clause; for the same words, or any others of equivalent signification, are nowhere else to be found in the instrument.

§ 95. Alexander Hamilton says the common defence is one of "the principal purposes to be answered by union;" and James Madison says, "it is an avowed and essential object of the American Union."[1] The idea seems to be taken directly from this first sentence of the Constitution; for it is here expressed precisely, and not at all in any other part. Yet these writers do not expressly refer to it as the origin of this or any other power of the government, or as imposing on them the duty of executing it. The Constitution had never been objected to on this ground; and it was no part of their duty, as advocates of its adoption, to enlarge the field of operation for the objectors. They

[1] Federalist, Nos. 23, 41.

both agree that the power must be unlimited in its extent, though they do not appear to contemplate it as embracing particulars in addition to, and differing in nature and character from, those specifically mentioned and assigned, out of the general powers of the government, to the legislative department. Hamilton says, "The authorities essential to the care of the common defence are these: To raise armies; build and equip fleets; prescribe rules for the government of both; to direct their operations; to provide for their support." Madison says, "They are those of declaring war, and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money." These are all specified powers of different departments, either the legislative or executive, to whom they are distributed by the Constitution; but they fall far short of embracing the whole *curriculum* necessary to enable the government to accomplish their great and comprehensive duty, as here prescribed, "to provide for the common defence."

§ 96. They may be sufficient to enable them to carry on war when it actually comes, as it may, with or without being declared. But how do they get the providential power to do many other and more important things, by way of preparation, to render these effectual? To build, stock, furnish, man, and maintain fortresses,

magazines, armories, arsenals, dock-yards, ship-yards, founderies, manufactories, and machinery for the fabrication of all kinds of warlike implements; military roads, ships of war, and ship-canals; working mines, growing ship-timber, and raising hemp? All this and much more when there is no war, nor prospect of any? To encourage sailors by bounties, and give education, in all the sciences and mysteries of war, to young men fitting for the military or naval service of the country? All these powers, to a greater or less extent, the government have been using ever since it was established; and must continue to use, or give up their chief duty of providing for the common defence. And yet they are none of them specified in any list of the particular duties of any department.

§ 97. They are included in the general duty and power of the government "to provide for the common defence;" and, so far as they are legislative, they devolve directly on Congress, as the depository of all the legislative power of the government, and also by the special authority to make all laws necessary and proper for carrying into execution all the powers vested in the government of the United States.[1]

[1] In Gibbons *v.* Ogden, 9 Wheat. R., Chief Justice Marshall, speaking for the Court, says, "The powers given, as fairly understood, render it [the government] competent . . . to the objects for which it is *declared* to be instituted." This refers directly to the objects mentioned in the enacting clause, and pronounces the powers of the government adequate to the accomplishment of them all.

When the people say they ordain this government on purpose "to provide for the common defence," to assert that they confer no power for the purpose is an attempt not only to cancel this part of the Constitution, but absolutely to stultify the nation. That a Constitution instituting a national government could have been made expressly for six great national and specific purposes, and yet include or imply no duty or authority to effect either of them, is too absurd for belief without proof, and too contradictory to be supported by proof. "That would be," in the language of Judge Story, "to create a power for a certain end, and then deny the end intended by the power."

CHAPTER IX.

THE GENERAL WELFARE.

§ 98. THE fifth avowed purpose of the Constitution was to "promote the general welfare." In the history of the government, it has not been usual to encounter objections to the Constitution, on the ground that it was not sufficiently liberal in its grant of powers to the government. Of course its friends have not felt themselves called upon to propound an elucidation and exposition of those parts of it which were most likely to call forth objections of the opposite character, — already sufficiently abundant, and, on account of their *ad captandum* quality, rather than their substantial weight, superabundantly troublesome. Such parts have been much more liable to be passed over and forgotten. Not a few stanch friends of the Constitution have, at different times, thought it expedient to repudiate and abjure their true and obvious meaning, force, and validity; while more have been willing to overlook and ignore them; and all have actually united with its adversaries in

abstaining from the legitimate use and salutary execution of them; till, in some instances, it has even been made a question, whether the right to exercise such powers has not been totally lost by *non user;* or, in other words, whether the people have not lost, through the continued infidelity of their agents, — the government, — the right to have their Constitution executed at all. This question we shall not stop to discuss. "Litera scripta manet."

§ 99. In regard to the words now under consideration, the efforts of the opposition have never been, as with other parts of the Constitution, to tone down or fritter away their meaning; but to construe them out of the Constitution, and get rid of them entirely. This they have rightly considered the only way of avoiding the full drift of general authority and governmental supremacy included in them. Mr. George Mason, however, one of the most decided opponents of the Constitution, held that this was a substantive power, and "that Congress should have power to provide for the general welfare of the Union." Patrick Henry seems to have been of the same opinion.[1] Richard Henry Lee said these terms seemed to him "to submit to Congress every object of human legislation."[2] And Mr. Monroe says, "An unqualified power to pay the debts, and provide

[1] 3 Elliot's Debates, 442, 590.
[2] Letter to Samuel Adams, Oct. 5, 1787.

for the common defence and general welfare, . . . would extend to every object in which the public could be interested."[1] Mr. Jefferson said this "would reduce the whole instrument to a single phrase, that of instituting a Congress, with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be a power to do whatever evil they pleased."[2] Mr. Madison asks, "What is the case that would not be embraced by a general power to raise money; a power to provide for the general welfare; a power to pass all laws necessary and proper to carry these powers into execution: all such provisions and laws superseding, at the same time, all local laws and constitutions at variance with them?"[3] Mr. Monroe says, "A power to provide for the common defence would give to Congress the command of the whole force and all the resources of the Union; but a right to provide for the general welfare would go much further," — meaning, undoubtedly, as is true, that it would go so far as to leave nothing beyond, within the scope of legitimate civil government.[4]

§ 100. Mr. Monroe adds, with great assurance, as if determined to squelch the whole doctrine, by charging it with the *ne plus ultra* of absur-

[1] Message, May 4, 1822.
[2] Opinion on the Bank, Feb. 15, 1791.
[3] Letter to Stevenson, Nov. 27, 1830.
[4] Message to Congress, May 4, 1822.

dity, "It would, in effect, break down all the barriers between the States and the general government." What barriers has the Constitution of the United States erected against itself? None, other than those implied in the duty of the general government to administer the Constitution, and execute the law, upon all the inhabitants of the land, whether people or States, citizens or aliens, individual or corporate; and in the correlative duty of all these to deport themselves accordingly. The Constitution confers no powers of government, and imposes no duty to govern, on anybody but its own agents, the government of the United States, which it makes supreme, as well over the States as over the people.[1] These gentlemen are all Virginians, and State-rights politicians; and, all but one, original opponents of the Constitution, and he afterwards an inveterate impugner of some of its most important principles. They do not, however, any of them attempt to disguise, or in any degree to obscure, the magnitude and importance of this great power to "provide for the general welfare."

§ 101. But jurists of a more reliable political character, and much higher authority, fully en-

[1] "All legislative powers herein granted" — all powers for making laws, and declaring what the law shall be — "shall be vested in a Congress of the United States." — Sect. 1.

"Resistance to constitutional authority, by any of the State functionaries, should not be anticipated; but, if made, the Federal government may rely upon its own agency in giving effect to the laws." — Per McLean, J., 16 Peters' R. 666.

dorse and confirm these views, so far as respects the extent of this great power. Mr. Madison calls it "an awkward form of describing an authority to legislate in all possible cases;" apparently forgetting that they are the precise words used by Alexander Hamilton for that express purpose, in his original draft of a constitution, as reported by Mr. Madison himself. His words are, "The legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defence and general welfare of the Union." This was intended to confer plenary legislative power upon Congress in all cases whatsoever; which he contended they ought to have, subject only to the veto of the President, the restrictions of the Constitution, and those imposed by the moral law and the essential objects of political society.

§ 102. The foregoing criticisms on the power were none of them made with direct reference to the enacting clause now under consideration; for this they consider to be entirely outside of the Constitution not forming any part of the law of the land. They refer to the same words in the 8th section of the first Article, which, in distributing the general powers of the government among the different departments, assign to Congress, in some detail, a portion of those intended to be exercised by them. These will be considered in their proper place hereafter. But as to the phrase now in question, as it

stands, unlimited and unqualified, in this first clause of the Constitution, there does not appear to be room for a doubt, that "to provide for the common defence and to promote the general welfare" include every thing that a good government ought to be called upon to do for the benefit of any people. In the words of Mr. Madison, "The common defence and general welfare embrace every object and act within the purview of a legislative trust."[1] They were practically so understood by the old Congress in administering the confederation, from which they were taken. Mr. Madison says, in the Federalist,[2] "The present [confederation] Congress have as complete authority to require of the States indefinite supplies of money for the common defence and general welfare, as the future Congress will have to require them of individual citizens."

§ 103. Mr. Justice Story says[3] these words are "broad enough to include all the purposes contemplated by the Constitution;" referring directly to this first clause of the instrument now under our examination. Mr. Hamilton[4] says, "The phrase [general welfare] is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union to appropriate its re-

[1] Veto Message, March 3, 1817. [2] No. 45.
[3] Commentaries, vol. ii. p. 395. [4] Report on Manufactures in 1791.

venues, should have been restricted within narrower limits than the general welfare; and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition." Mr. Monroe[1] says, in almost the same words, "More comprehensive terms than 'to pay the debts, and provide for the common defence and general welfare,' could not have been used."

[1] Exposition of May 4, 1822.

CHAPTER X.

SECURITY OF LIBERTY.

§ 104. THE sixth and last of the avowed purposes of the people in the establishment of their government, and for the accomplishment of which they of course intend their government shall be responsible, is "to secure the blessings of liberty to ourselves and our posterity." Here the last and most valued of the natural and constitutional rights of the people is placed, expressly for security and safety, directly under the care and guardianship of the government of the United States. The provision is afterwards supported and assisted by an auxiliary Article, recognizing the common-law right to personal freedom, and perpetuating the common-law remedy, by *habeas corpus*, against its infringement; and by another, making a direct and absolute prohibition of any deprivation of it, otherwise than by due process of law. That, in the middle of the third generation after the adoption of such a Constitution by the American people, there should have existed in their midst

four millions of people, partly of their own posterity, mostly natural-born citizens of the United States, and universally resident inhabitants of the land, subject to its government and entitled to its protection; yet forcibly held in absolute chattel slavery, destitute of all rights, natural or constitutional, and liable to be bought and sold like cattle, — is a mortifying evidence of the incompetency of written laws, and the infidelity of human agencies, to counteract the selfishness, avarice, and injustice of men.

§ 105. This important object of the people has obviously failed of its accomplishment, not from any defect in the constitutional power delegated, but from the voluntary abandonment of the duty by the government itself. This was first done by the first Congress, and repeated afterwards as often as the subject, in any form, came before them, till the breaking out of the rebellion in 1860.

§ 106. Addresses were presented to the first Congress from the yearly Quaker meeting of Pennsylvania, New Jersey, Delaware, and western parts of Maryland and Virginia, and from the Society of Friends in New York, "against the continuance of the African slave-trade." The ordinary motion, to send it to the appropriate Committee, was resisted by the whole force of the slave interest in the House; not on the ground that Congress had no right to interfere with the subject, but because it was hostile to Southern

institutions; betrayed "a disposition towards a total emancipation;" would jeopardize the tenure and value of property in slaves; make slaves restless by exciting hopes of freedom; and "will furnish just cause of alarm to the Southern States."

§ 107. In this debate it was denied that the claims of morality or religion formed any good ground for Congress to act on the subject; and it was said expressly, "that slavery is not only allowed, but commended," in the Bible, and that our Saviour in particular "has allowed of it." The next day, the Memorial of "The Pennsylvania Society for Promoting the Abolition of Slavery" was presented, asserting the doctrine of the Declaration of Independence, "that equal liberty . . . is . . . the birthright of all men;" and praying that Congress "will step to the very verge of the power vested in you, for discouraging every species of traffic in the persons of our fellow-men." — (Signed), Benjamin Franklin, President. This, and the memorials of the preceding day, were taken up together, and again debated. Their commitment was opposed by the same men, on the same grounds, with an additional unfounded assertion, that some of them "contained an unconstitutional request."

§ 108. In this debate the advocates of the commitment asked nothing more than a consideration of the petitions in the ordinary course of similar documents, with a view to a fair application of such authority as they might be found

rightfully to possess to the evil complained of. Mr. Thomas Scott, of Pennsylvania, made a strong intimation, that slavery itself was unconstitutional. He said, "I cannot, for my part, conceive how any person can be said to acquire a property in another;" and he would "support every constitutional measure likely to bring about its total abolition. . . . I do not know how far I might go if I was one of the Judges of the United States, and those people were to come before me and claim their emancipation; but I am sure I would go as far as I could." Mr. Madison said, "There are a variety of ways in which Congress could countenance the abolition; and regulations might be made in relation to the introduction of them into the new States to be formed out of the Western Territory." [1]

[1] It is worthy of note that this speech was made in 1790, after slavery had been totally prohibited in all the territory north-west of the Ohio, and of course must have referred exclusively to territory south of that river, viz., Kentucky and Tennessee, which was the only remaining territory we then had.

In another debate in the first Congress, on "Duties on Imports," and on the proposition to tax the importation of slaves, Mr. Madison said, "Every thing which tends to increase this danger [*i.e.*, internal or external attack], though it may be a local affair, yet if it involves national expense or safety, becomes a concern to every part of the Union, and is a proper subject for the consideration of those charged with the general administration of the government."—1 Benton's Abr., 75.

In this debate also the exercise of the power of taxation on the importation of persons, though expressly given in section 9, was resisted with the same acrimony that was always manifested, whenever the subject in any form required the consideration of Congress. The constitutionality or unconstitutionality of any measure on this subject entered into their contemplation no further than to consider the use that could be made of it in aid of their resistance, determined upon without any regard to either.

§ 109. Mr. Tucker, of South Carolina, said, "A general emancipation of slaves by law . . . would never be submitted to by the Southern States without a civil war." And Mr. Jackson, of Georgia, said the subject was "likely to light up a flame of civil discord; for the people of the Southern States will resist one tyranny as soon as another. The gentleman says, if he was a Federal Judge he does not know to what length he would go in emancipating these people; but I believe his judgment would be of short duration in Georgia. Perhaps even the existence of such a Judge might be in danger." All the opponents of the motion represented the introduction of the subject as an attack on the South; "on the palladium of their property;" on their character, their morals, their humanity, their "religion and piety." All the pernicious effects attributed to it were charged to the interference of Congress; to their taking any cognizance of the subject; to their using or exercising any of their admitted constitutional rights having any relation to it; or even to their inquiring whether they had any such rights, or what they were,—and not to any thing objectionable in the character of any measure it might be proposed to adopt. They therefore put themselves on the defensive, and resisted every attempt, in any form, to take any cognizance of the petitions, even for the purpose of inquiring into the nature of their own rights

and duties. Whatever these might be, they were determined none should be exercised, if by any means they could prevent it. Nevertheless the vote passed "to commit," by forty-three to eleven, which was probably about the proportion of those who were originally willing to consider and do what might be found proper, to those who were from the beginning determined that slavery should not be meddled with at any rate.

§ 110. The Committee, which, with the exception of one Virginian, was composed entirely of Northern members, made a report, worse than nothing for any national purpose, which came up, in a few weeks, for discussion in Committee of the Whole. The subject was again debated, in the same temper as before; and the resolutions of the Committee, after being razeed substantially to a simple disclaimer of any "authority to interfere in the emancipation of slaves or in the treatment of them in any of the States," were reported, with the amendments, to the House, and there taken up for final disposition by a majority of one vote; where, by a majority of four votes, they were ordered to be entered on the Journal, but were never afterwards called up or otherwise acted upon. The slaveholders voted against the whole proceedings throughout, though the purport of them was to yield the whole subject to their own control. Many Northern members voted with them, in the negative; either because they chose to yield to

Southern clamor, or because they thought the proposition worse than nothing. So that in the same House where, a few days before, there was a majority of thirty-two, or about four-fifths of the whole number, in favor of appropriate action, there was now but a bare majority in favor of allowing the Journal to show that the subject had been before them, and that they did nothing. But the maxim, *Ex nihilo nihil fit*, was not sustained. Colonel Benton, from whose "Abridgment of the Debates" this account has been extracted, remarks sagaciously at the close, "These proceedings put an end to abolition petitions in Congress." And well they might.

§ 111. In the next (second) Congress, however, the subject came again before them, on the petition of Warner Mifflin, which was voted "to be returned to him." Mr. Ames, who presented it, said, "It was his opinion, which he had expressed to the House long ago, that this government could not with propriety take any steps in the matter referred to in this petition. . . . He considered it totally inexpedient to interfere with the subject." Mr. S. Livermore did not "believe there was any disposition to bring it forward." In the great debate of 1830, Mr. Webster said, that, after the above-mentioned proceedings of the first Congress, it had "never been maintained or contended at the North, that Congress had any authority to regulate or interfere with

the condition of slaves in the several States. No Northern gentleman, to my knowledge, has moved any such question in either House of Congress."

§ 112. This abandonment was carried so far, that, at the close of the session of 1860–61, after most of the Southern States had passed their ordinances of secession, and met in convention to organize their Confederacy, leaving Congress with a large majority of Republicans and friends of the incoming Administration, the House of Representatives passed, by a unanimous vote, the following declaratory Resolution: —

"*Resolved*, That neither the Federal government nor the people, or the governments, of the non-slaveholding States, have the right to legislate upon or interfere with slavery in any of the slaveholding States in the Union." And the two Houses, by more than a two-thirds vote of each, proposed to make the abandonment perpetual by the following addition to the Constitution: —

"No amendment shall be made to the Constitution, which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."

Afterwards President Lincoln, in his inaugural address, volunteered his approval of the proposition.

§ 113. The subject was discussed, in some aspect of it, not less than six times during Washington's Administration, and as often or oftener in the subsequent Administrations, — always in the same arrogant, aggressive, and threatening temper on the part of the South, and in the same yielding, compliant, and apologetic style on the part of the North, till Mr. Calhoun announced the determination to force the North to an issue.[1] As the government was substantially in the hands of the South, those Northern men who modestly wished to stand well with the powers that be, endeavored as far as possible to place their disposition to leave the subject in the hands of the State governments, on the ground of political expediency; while the more ambitious aspirants for Southern favor have not hesitated to assert, that "Congress has no right to interfere with slavery in any State," — really, that the slavery or freedom of the citizens of the United States must be settled by State laws, and that the government or Constitution of the United States had no rights or duties on the subject; thus abrogating or repealing the whole Constitution, so far as it relates to "securing the blessings of liberty."

§ 114. Before 1860, this sentiment had come to be considered and admitted as binding on the politicians as if it had actually made a part

[1] See Benton's Thirty-years' View, and his Examination of the Dred-Scot Case.

of the Constitution. Congress had repealed all the prohibitions against carrying slavery into any of the Territories of the United States, and establishing and sustaining it there; and the Supreme Court had decided, in the Dred-Scot Case, that any citizen had a constitutional right to do so, and neither Congress nor any body else had any power to prevent it. The same principle was equally applicable to the States. At this stage of their progress, when there seemed to be nothing left for the slave-mongers to demand, the people saw fit to elect a new chief magistrate, who, in relation to the rights of the government over the Territories, entertained some opinions at variance with the recent practice of Congress, and the more recent decision of the Supreme Court; and thereupon the whole South rushed directly into rebellion, notwithstanding they controlled large majorities in both Houses of Congress, to prevent any legislation adverse to their wishes.

§ 115. The new Administration also, including the President and leading members of Congress, after the abdication of the Southern members, and during the principal part of the war, held steadfastly to the same dogma of State rights over slavery.[1] That it was well understood, at its original introduction, to have no foundation in the Constitution, is manifest from the facts, that congressional action on the subject was not

[1] See Raymond's Life of President Lincoln, p. 240.

resisted on constitutional ground, and was sustained by a vote of almost five to one, against such specious objections as an interested minority could invent. It seems to have been resorted to only as an expedient to cover up the abandonment of moral principle to appease an unjust claim; which claim itself constantly increased in force, by indulgence, till it was thought strong enough to refuse all compromise and overturn the Constitution, and thereby save the trouble of overruling it. The dogma never was sustained by any valid argument as a constitutional doctrine, but only by personal and party pledges, exacted and enforced, on political grounds, by the overwhelming influence of the slaveholding interest in the country.

§ 116. But the power of the general government to "establish justice . . . and secure the blessings of liberty" to all the people and their posterity, though so long abandoned and even disclaimed, is still in the Constitution, and is as important to be asserted and enforced as it was originally to be incorporated there. It is true the State governments may do this; and it is also true that they may not do it. It is equally true, that it may be done without the action of any government. But in neither case is the right or duty of the general government diminished or affected.

§ 117. Mr. Madison says,[1] "The powers re-

[1] Federalist, No. 45.

served to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." Mr. Hamilton[1] speaks of "the ordinary administration of criminal and civil justice" as "belonging to the province of the State governments." Mr. Jefferson[2] says, "The States individually have the principal care of our persons, our property, and our reputations, constituting the great field of human concerns." Chancellor Kent says,[3] "The vast field of property, the very extensive head of equity jurisdiction, and the principal rights and duties which flow from our civil and domestic relations, fall within the control, and we might almost say the exclusive cognizance, of the State governments." And Judge Story says,[4] "They [State governments] possess the immediate administration of justice in all cases, civil and criminal, which concern the property, personal rights, and peaceful pursuits of our citizens. They have a full superintendence and control over the immense mass of local interests of their respective States."

§ 118. By none of this, however, do they, or any of them, mean that the general government have nothing to do with these subjects, or that they are delegated by the Constitution to the

[1] Federalist, No. 17.
[2] First Message to Congress in 1801.
[3] 1 Com. 418.
[4] 1 Com. 488.

States; but simply that they are not withdrawn from State jurisdiction, or prohibited by the Constitution to the action of the State governments. They consequently remain where they were, and, "in the ordinary course of affairs," may continue so. Powers delegated to the general government, if not expressly or impliedly prohibited to the States, may be used by them when not used by the United States, on the same principle that individuals may do as they please in any matter not contrary to law. The States are recognized as governments, and, when their own constitutions permit, may do as they please; provided they do not interfere with the Constitution and laws of the United States, or with the civil or natural rights of the people recognized thereby, and held in conformity to them. The right of every person to "life, liberty, and property," to "keep and bear arms," to the "writ of *habeas corpus*," to "trial by jury," and divers others, are recognized by, and held under, the Constitution of the United States, and cannot be infringed by individuals or States, or even by the government itself.

§ 119. It is not claimed that the State governments have any inherent, exclusive right, or constitutional grant of power, on any of these subjects. The Constitution of the United States grants them nothing.[1] The people of the

[1] "The Constitution does not grant to the States the power of passing bankrupt laws, or any other power." . . . "When the American people

separate States grant them all the legislative power they have to grant; but of course nothing inconsistent or incompatible with what they had before, in common with the rest of the people of the United States, delegated to the general government; for the very obvious reason, that it was already given away, and was no longer theirs to bestow. What the Constitution expressly prohibits to the States, or what it impliedly prohibits, by an exclusive grant to the United States, or otherwise, the State governments cannot do. But what is prohibited to them only by means of the supremacy of the acts of the general government, they may do when there are no such acts applicable to the subject; on the universal principle, that all things are lawful which violate or infringe no law.

§ 120. The Constitution seems, in terms, to make all its powers exclusive, by reserving[1] neither to the States nor to the people any thing which is delegated to the United States. What is given away, delegated, is not reserved; and of course cannot be used, re-granted, or delegated to any body else. This would prohibit the States from doing any thing that the general government is authorized to do. Strict con-

created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers remained as they were before the adoption of the Constitution, except so far as they may be abridged by that instrument." — Per Marshall, C. J., in Sturgis *v.* Crowningshield, 4 Wheat. R.

[1] See 10th Amendment.

structionists, if true to their own principles, would hold to this steadfastly, which would surely shut up the State governments to very narrow limits indeed. But the judicial construction has been much more liberal; and where a subject is distinctly assigned to the general government, yet if they neglect to regulate it, the State governments may do so, and their acts are valid.[1]

§ 121. On any just principles of reasoning, it is impossible to consider the general government unauthorized to do any thing that the people assert they made it on purpose to do. When they say that they made it on purpose, "in order" to accomplish certain specified objects, those objects are *ipso facto* submitted to its jurisdiction, and may be accomplished by any means under its control; and not only all specified powers, but all other necessary means, are expressly placed at its control, for the very purpose of executing the jurisdiction so vested in it. When the Constitution requires an end, it authorizes all the means of the government to be applied to it; and, when it directs means, it authorizes their application to any constitutional end.

§ 122. The general government, then, are required by the people, and actually bound, "to form a more perfect Union, establish justice,

[1] Sturgis *v.* Crowningshield, 4 Wheat. Rep.; and Ogden *v.* Saunders, 12 Wheat. Rep.

insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves [all the people] and our posterity." These are the powers vested, and all the powers originally vested, in the whole government generally; in distinction from those specially assigned in detail to the several departments and officers of the government, on the division and distribution of the general powers among them. Such is the purport and effect of this first part or enacting clause of the Constitution. The subsequent Articles and sections proceed to arrange the organization of the government, with its different departments and officers; and to distribute among them such portions of those general powers as appropriately fall to the share of each, together with such further additions, regulations, qualifications, and restrictions, as were thought appropriate to the great purposes and objects of a firm national government, adequate to the exigencies of government and the preservation of the Union.

CHAPTER XI.

THE ORGANIZATION.

§ 123. We have seen, that the people of the United States, in accordance with the resolution of the Confederation Congress by which the Convention was assembled, by ordaining and establishing this Constitution, have formed and instituted a "Firm National Government," which it calls the "Government of the United States," "in order" to accomplish the six great purposes announced in the ordaining or enacting clause; and which render the government "adequate" not only to "the preservation of the Union," but also to all the "exigencies of government." Its duty is to execute the Constitution, and its powers are commensurate with the duty. This government is divided into three departments, the Legislative, Executive, and Judicial; and the first three Articles next following the enacting clause disclose the mode of organizing each of these departments, and describe in general terms, and by reference to many examples, that portion of the whole duty of such a govern-

ment, which falls appropriately to each of those departments.

THE LEGISLATIVE DEPARTMENT.

§ 124. The legislative department is organized in two branches, called the Senate and House of Representatives, and named the "Congress of the United States."[1] The House of Representatives[2] is composed of members chosen every second year by the people of the several States. The people of the several States are that portion of the citizens of the United States who are the resident inhabitants of particular States. These constitute the body represented, and from among whom the Representative must be selected; but though the Representative is said to be "chosen by the people," yet all the people are not necessarily and under all circumstances actual electors. Electors may be subject to regulations, and required to have other qualifications; that is, to conform to law in other respects than mere citizenship, being of the people, members of the body politic. Though all citizens are not voters under all circumstances, in all places, and at all times, yet no aliens or others not citizens can be under any circumstances, because by the Constitution the Representatives must be chosen only by "the people, — the citizens;" and who they are, whether

[1] Article I., section 1. [2] Article I., section 2.

by birth or naturalization, depends on the laws of the United States.

§ 125. The qualifications of electors of Representatives, other than habitancy and citizenship, may be prescribed by law; but they must "have the qualifications requisite for electors of the most numerous branch of the State legislature." This provision has been claimed as absolutely conferring the power to fix the qualifications of electors on the State legislatures. But this is obviously a misconstruction. It neither grants nor restricts the power to any body. As it stands, it would comport well, and be perfectly consistent, with an addition giving the power expressly to either government. Such an addition not being made, the clause leaves the power as it found it, unprovided for in this place; and, if not provided for elsewhere in the Constitution, it remains with the other "powers not delegated . . . nor prohibited," but "reserved to the States respectively or to the people." We shall find, however, that it is provided for elsewhere. This is the plain and palpable effect of the clause as it here stands by itself alone; and it is further corroborated by the fact, that in its original form, as reported by the Committee of Detail, it was objected to by Mr. Governeur Morris on this precise ground, that, "as it stands, it makes the qualifications of the national legislature depend on the will of the States;" and that the revised draft, which altered it essentially, and

probably on this very account, so as to read as it now does in the Constitution, was made by Mr. Morris himself.[1]

§ 126. The word "requisite" has no necessary relation to the legislative power of the States, any more than to that of Congress. It might refer to either or to neither. If the State legislatures have the exclusive power of deciding what qualifications are "requisite" for electors of their "most numerous branch," they may decide that none are; and so open the elections to aliens as well as citizens, which would be contrary to the Constitution. Or they may decide that their "most numerous branch" shall be appointed by the governor and council, or by the Senate, or by the county courts, or otherwise; and so not elected by the people at all. Neither the Constitution nor any law of the Union requires expressly that either branch of a State legislature shall be elected by the people. But it does require that the State government shall be republican, and that Representatives to Congress shall be chosen by the people, and incidentally that State Representatives shall also; for otherwise the qualifications of the electors of the two sets of Representatives would, in this respect, be different; and could not be the same or identical, as the Constitution is understood to require. When Congress undertake to prescribe a republican government to the States, and of

[1] See 3 Madison Papers, and 5 Elliot's Debates.

course determine what is such a government, they will be as likely to decide what kind and what portion of the people shall participate in the suffrage, and under what regulations and restrictions, as they will to decide what part of the governmental officers shall be chosen by popular election.

§ 127. If "the most numerous branch of the State legislature" are not chosen by the people at all, or only by a small and privileged class of them, what becomes of the Representatives to Congress, on the theory that they must be chosen by the same electors? And what becomes of the republicanism of the Constitution, or even of the existence of the government, if the States, or any other party than the government itself, can thus control or abrogate the elections of the Representatives of the people? It is obvious that such a construction cannot be the true one, for with it the government cannot stand. As the Representatives to Congress must be chosen "by the people of the . . . States," and "the electors shall have the qualifications" [all the qualifications] "requisite for electors of the most numerous branch of the State legislature;" it follows inevitably, that citizenship and residence or habitancy, the two ideas that constitute "people of the State," are two of the "qualifications" equally "requisite" for both sets of electors, by the Constitution itself, without and independent of any regula-

tion by either government. The only question, therefore, is regarding other qualifications than habitancy and citizenship. Whatever these may be, it is evident they cannot enlarge the list, or include any who have not those two qualifications. It then results that the additional qualifications are only restrictions on the rights of resident citizens; and the true inquiry is, what restrictions may be constitutionally imposed by any body? or, in other words, what kind and what portion of the "people of the State" may be excluded from the suffrage?

§ 128. This question looks directly to the republicanism of the State, and is expressly delegated to the general government. If the general government do not define it or prescribe the rule, and so long as they do not, no doubt the State governments may, in the same manner and by the same right that they do other things not inconsistent with the Constitution and laws of the United States; though the power of ultimate control is expressly delegated to the general government. "This clause means that the States shall determine [in the first instance], not who shall vote, but when, how, and where the electors shall vote; and that they may determine the time, place, and manner in which they shall vote, and impose restrictions [regulations], not disfranchisement."[1] And even this Congress may overrule.

[1] Senator Yates's speech in the Senate, Feb. 19, 1866, on section 4.

§ 129. The citizen, though his right as such cannot be denied except on forfeiture, is yet bound, in the exercise of this as of all other rights, to conform to such regulations and qualifications of his right as the purity of the elections, and their adaptation to effect their legitimate purposes in the administration of the government, may be judged by the law-making power to require. He cannot vote when, where, and for what officers he pleases, but must conform to the law. So in regard to preliminary residence, registration, capacity to understand and perform the duty, &c., he must conform to the law. How far such regulations may go, so as substantially not to derogate from the constitutional right of suffrage as a citizen, is not susceptible of exact definition. But the line, wherever it is found, may not be passed. If any imbecile portion of the people are thus debarred, by the laws of nature, from exercising the right personally, they may receive the benefit of its exercise through the guardianship of their imbecility which the same laws of nature have provided. Whatever regulations of this or any other kind may constitutionally be adopted, by State legislatures or otherwise, are, by Article I., section 4, under the control of Congress. If a State government may disfranchise a citizen because he is black, or for any other cause, they may because he is an officer, agent, soldier, or servant, in the pay and employment of the

United States; or even because he is loyal and under oath to support the Constitution: and thus banish the government, and every department and officer thereof, out of their jurisdiction.

§ 130. The qualifications of Representatives are actual residence, seven years of citizenship, and twenty-five years of age. Every State shall have at least one Representative; and the others shall be apportioned among the States, according to numbers, counting every freeman, except Indians not taxed, and three-fifths of all others. But the whole representation shall not exceed one for every thirty thousand; and the enumeration shall be made every ten years. When vacancies happen in the representation of any State, the executive authority thereof shall issue writs of election to fill such vacancies.

§ 131. There is an ambiguity in the mode of apportionment of Representatives, arising from the uncertainty of the meaning of the word *free*, or *free persons*. It may be the correlative of alien, slave, or bond. At the time of our Revolution, and afterwards, it was usual to enfranchise citizens, members of the body politic, by legal forms, involving a record, an oath, or other formalities; whereby individuals were admitted members, constituted *freemen*, and entitled to all the rights of citizenship. In this way persons were said to be *free* of a city, State, or corporation, — to be freemen, or to have the freedom thereof; meaning that they had a right to the

franchise of membership or citizenship. Such persons were called *free*, or freemen, in distinction from outsiders, aliens or others, who were destitute of the franchise. Others were called *free* in contradistinction from slaves, who were held as property, mere chattels, having no rights, personal or political. In this sense it included everybody who had rights of any sort, or were not slaves. Another use of the word is in opposition to *bond*. Persons are said to be *bond* or *free*, in reference to some kind of legal obligation by which some are held, and from which others are free. In this sense *free persons* would mean those who were under no legal bond or obligation to anybody, in distinction from those who were so bound.

§ 132. In this place it is of no consequence what is the meaning of the word *free*, only as it settles the dividing line between that portion of the citizens — "people of the several States" — who are to be counted as units, and that other portion who are to be counted as fractions. In some other respects, it may have more importance. It will be observed that they are all citizens, — people of the several States," — however counted; because they are the only persons represented, by whom the Representatives are chosen, and according to whose numbers the Representatives are apportioned; and no others could be counted at all. It ought to be remarked, however, that in practice this principle

has not been observed. The census or decennial enumeration has always included all the actual inhabitants of the land, except "Indians not taxed," whether aliens or slaves or both, without any regard to citizenship. Perhaps this is consistent with the words of the Constitution, though it is a manifest departure from principle, and ought to be corrected in practice, by making the law to restrict the enumeration to "the people [citizens] of the State," who alone can be represented in fact, according to the first section, and who alone on republican principles are entitled to be represented.[1] The census law, therefore, ought to be so amended as to take the aliens in a separate list, and exclude them from the enumeration of those on whose numbers the apportionment of Representatives is to be predicated. If the statute does not direct in this matter, it leaves it to the preference of the executive officers.

§ 133. *Free persons* and *other persons* are all persons; that is, all "the people of the several States." Who are "the people," the citizens, this clause does not assist in determining. But we know from other sources, that neither aliens nor slaves can be, till the disabilities of alienage and slavery are removed by naturalization and emancipation respectively, when they are aliens and slaves no longer. The law that confers a new *status* abolishes the disabilities of the old.

[1] An alien is not an inhabitant. — College *v.* Gove, 5 Pick. R. 378.

The law that should incorporate aliens and slaves with citizens, making them and counting them as "people of the several States," would confer a new *status*, and thereby not only abolish the disabilities of alienage and slavery, but extinguish the *status* which constitutes them.

§ 134. The franchise or right to be a citizen puts an end to whatever would prevent it. If, therefore, this provision of the Constitution authorizes the counting those who were aliens or slaves in the class of "all other persons," it thereby terminates their alienage or slavery, and transfers them directly to the class of the *free*, by conferring the franchise which makes them citizens. But there are decisive reasons for believing that the "people of the United States" intended no such thing in regard to either. As to the disabilities of alienage, they have made an express provision for the method of their removal, which of course they could not have intended to render nugatory by abolishing those disabilities altogether in this sweeping clause. As to slaves or slavery, the Constitution contains no intimation, admission, or recognition that there was or could be any such class under its jurisdiction, but ignores them entirely. Of course it did not intend, in this indirect way, to abolish or destroy what it knew nothing about, and of which it did not even admit the existence.

§ 135. By the phrase "including those bound

to service for a term of years," it appears that some persons, not strictly and properly belonging to the class of *free persons*, are directed expressly to be placed in that class. The effect of this form of expression is to add to the class described some who would otherwise be excluded. If you say of persons twenty-one years of age, including those who have red hair, it is insensible and unmeaning; because those who have red hair were included before, as well as those who have black hair. But if you say of persons twenty-one years of age, including those who will complete their twenty-first year before Christmas, this is intelligible, and adds to the list those who would otherwise be excluded. So when you speak of free persons, including those bound to service for a term of years, you add some who were not otherwise included. This cannot mean aliens; because, whether they are or are not *free* in the sense of the Constitution, as aliens, they are no more or less so for being under bonds for a term of years. If they are not included without being under bonds, they are certainly no more free, by being under bonds for a term of years. So they cannot be added on account of this qualification. If alienage excludes them, they are aliens still. If it does not exclude them, they are not added by their bonds.

§ 136. This cannot mean slaves, because persons "bound to service for a term of years" are

not slaves, and never were so considered anywhere. All such are free, in the sense of the Constitution, and included, independent of this clause. So they are not added by it.

The other phrase, "excluding Indians not taxed," is of a similar character. It excludes those who would otherwise be included. Indians are *free*, whatever may be the constitutional sense of the word. They are free in opposition to slave, certainly; and they are equally so in opposition to *bond*, for they are under no kind of bonds to any body. And they are free in opposition to alien; for they are natural-born citizens of the land, and so have the best possible franchise. They would necessarily be included, but for this express exclusion.

§ 137. If the second class, "all other persons," are aliens, then the effect of this provision would be to take a portion of the aliens, and make them *free*, — put them into the first class; and the ground of discrimination would be the bond to temporary, instead of permanent, service. Aliens as such are not bound at all; but if any of them are so, and a part of these are to be favorably distinguished from the rest in respect to citizenship, it would be those most permanently bound. For those bound permanently would at least be permanent residents, while those bound for "a term of years," which means any definite time, whether days, weeks, months, or years, might soon go back to the land from

whence they came. But bondage of any sort has no relation to alienage; and, if the idea had been to take a portion of the aliens, and put them among the *free*, they would not have been selected with reference to their being or not being bound to service or any thing else, nor with reference to the time the bond had to run; but with reference to age, property, education, business, or some other qualification for good citizenship.

§ 138. If the second class, "all other persons," are slaves, then the purport of this provision would be to take a part of the slaves, the second class, and make them *free persons*, — place them in the first class. But if a slave can be bound at all, or be under any obligation, he certainly cannot be bound temporarily. No man can be a slave for a term of years, because this would give him a right to have his slavery terminate when the years were ended. But a slave cannot hold this right, and be a slave, any more than he can hold any other right, and retain the same *status*. So that, on the supposition that the second class are slaves, the provision in favor of those bound for a term of years means nothing, transfers nobody to the other class, and is altogether nugatory. So the second class, "all other persons" than *free persons*, are neither aliens nor slaves.

§ 139. The correllative of *free*, as here used, is *bond;* and the two classes are *free persons*

and *bound persons*. A man may be under a legal obligation, or be *bound* to do any thing; but the *bond* here intended is doubtless for personal service, and a part of those under this kind of legal *bond* are transferred to the first or *free* class, on account of the definite termination of their *bond*. A definite term is not necessarily shorter than an indefinite one, but is considered more favorable to the obligor, on account of the certainty of its termination. The difference does not relate to the character of the *bonds*, either as to the nature of the duty or obligation enforced by them, or the length of time they may continue; but only to the definite or indefinite time of their termination.

§ 140. The bonds must be legal, for the question concerns only legal rights. They must enforce legal if not moral duties and obligations, or they are not legal bonds. It will not be pretended, that a mere forcible holding to compulsory service, without right, legal or moral, creates any duty or obligation, or forms any legal *bond* whatever. A slave can assume neither, nor can he incur or be subjected to either. The same law that makes him a slave deprives him of all rights and absolves him from all duties. He can owe nothing, nor be under any legal bond or obligation, because he is deprived of all capacity to be so, or to perform if he was so. He cannot even owe "service or labor," because his service or labor, and even his body, is

not his own. So that slaves cannot be included among the persons "bound to service," because they cannot be under any such obligation, or owe any such duty. They cannot be among the class of "other persons" than "free persons," because both classes are citizens, "people of the several States;" and slaves cannot be so, for want of franchise or right, which they cannot hold any more than any other right, natural or constitutional.

§ 141. There is yet another reason why slaves cannot be intended by either classification; which is, because there are none, and can be none, under the jurisdiction of our government. The Constitution was made "to secure the blessings of liberty." It perpetuates the right to liberty by perpetuating the common-law right to the "writ of *habeas corpus*," which restores liberty whenever it is infringed. And it declares that "no person shall be deprived of . . . liberty . . . without due process of law." So there can be no slaves in the land. There never was, and never can be, a person legally held in slavery under our Constitution. This principle is now [1865] fully recognized by the thirteenth Amendment.

THE SENATE.

§ 142. The other branch of the legislative department is called the Senate,[1] and is com-

[1] Section 8.

posed of two Senators from each State, chosen by the legislature thereof, for six years, each having one vote; and the body so classified, that one-third of the whole number go out every two years. If vacancies happen during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies. If the legislature adjourn without filling the vacancy, it has been questioned whether the place can be otherwise filled. But it is difficult to see why, when the legislature, by adjourning without making an appointment, create a vacancy, this is not a vacancy occurring or happening during the recess, and so to be filled by a new executive appointment. Such a vacancy certainly did not "happen" till the State legislature had adjourned; for the appointment held good till the adjournment. It must, then, have happened "during the recess," and so should be filled by a new executive appointment. It has been held by the Senate, that a legislative appointment, made by the body in office when the vacancy occurred, supersedes an appointment made by a prior legislature in anticipation of the vacancy. A Senator must be thirty years of age, have been nine years a citizen of the United States, and when elected be an inhabitant of the State for which he is chosen.

THE SEPARATE POWERS.

§ 143. The separate powers of the Senate and House of Representatives are specified in different sections of the first Article. Each House shall choose its own officers, except the "President of the Senate;" and be the judge of the elections, returns, and qualifications of its own members. This is in the nature of a judicial power, and should be regulated by known principles of law. Each House may not make rules prescribing the time, place, and manner of electing their members, or how, when, and by whom they may be elected; but they may judge whether the election, when made, was in conformity to such rules as were prescribed by law. A majority of each shall constitute a quorum to do business. This has been held to be a majority of the members actually sworn in and entitled to seats at the time, and not a majority of possible members, or a majority of a full delegation from all the States. But a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide. Each House also determines the rules of its proceedings, and can punish its members for disorderly behavior; and, with the concurrence of two-thirds, expel a member. They shall each keep a journal of its proceedings, and from time to time publish such

parts as do not require secrecy; and enter thereon the yeas and nays on any question, when desired by one-fifth of the members present.

§ 144. The members of both Houses shall receive a compensation for their services, to be ascertained by law; and shall be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same, except in cases of treason, felony, and breach of the peace; and, for any speech or debate in either House, shall not be questioned in any other place. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

§ 145. The House of Representatives shall have the sole power of impeachment, and shall originate all bills for raising revenue; but the Senate may propose amendments to revenue bills, as in other cases, and shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concur-

rence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall be liable to indictment, trial, judgment, and punishment, according to law.

§ 146. In the case of a conviction on impeachment of the President, Vice-President, or other civil officer of the United States, for treason, bribery, or other high crime or misdemeanor, the judgment must be removal, and can be nothing less.[1] Whether persons not in any civil office may be impeached, and whether persons in office may be impeached for any less offence than those above named for which they must be removed, the Constitution does not expressly decide. But disqualification for office may be superadded in the case of officers, and made the whole judgment in other cases, if there may be any. In the case of William Blount, the Senate, having expelled him from their body, declined to try him on the impeachment. Many principles were ably discussed by learned counsel; but it is difficult to say what principle was decided by sustaining the plea to the jurisdiction of the Senate. In the case of John Pickering, they substantially decided that a conviction and judgment of removal might be had for less offences

[1] Article II., section 4.

than those above specified; or rather, that a low crime was a high misdemeanor in a Judge.[1]

§ 147. When the President of the Senate, who is the Vice-President of the United States, shall be absent, or exercise the office of President of the United States, the Senate shall choose a President *pro tempore*. It has been decided, that each House has, by implication, the power to punish for contempt; though no such power is expressly given by the Constitution, except in regard to their own members, or has been conferred by law. It is founded on its

[1] In the case of Blount, the House refused either to direct their Managers to move for process to compel his personal attendance, or to proceed without it; thus leaving the matter to the Senate. The Senate, on motion, admitted an appearance by counsel, and then permitted them to file their plea, without objection. Nothing can be inferred from this action, against the right of the Senate to take the respondent into custody, either with or without a voluntary appearance on summons. In opening the prosecution, Mr. James A. Bayard, Chairman of the Managers, said, "The Constitution has said who shall have the power to impeach, and who of trying impeachments. It has also limited the extent of the punishment. But it has not described the persons who shall be the objects of impeachment, nor defined the cases to which the remedy shall be confined. . . . Upon these points we are designedly left to the regulations of the common law. . . . The question therefore is, What persons, for what offences, are liable to be impeached at common-law? . . . The question of impeachability is a question of discretion only with the Commons and Lords. . . . All the King's subjects are liable to be impeached by the Commons and tried by the Lords." Judge Pickering was impeached, tried, convicted, and removed, in his absence and without counsel. His misfortune was, that he held an office, the duties of which, by the providence of God, in depriving him of reason, he was disqualified to perform or to resign; and for the same reason was unable to defend himself, or even to appoint counsel to do it for him. His office was wanted by individuals from personal considerations, and by the Administration to pay partizans. Under such circumstances, impeachment was a ready remedy; and, with or without offences, which were not likely to be wanting, encountered no obstacles adequate to insure a correct administration of justice.

necessity for self-preservation; but the punishment extends only to imprisonment, and that only during the continuance of the body exercising the power.[1] Neither House can adjourn for more than three days during the session of Congress, nor to any other place than that in which they are sitting, without the consent of the other House; and each is a complete check upon the other in all the business of legislation.

§ 148. The Senate, for certain specified purposes, constitute an advisory council to the President, and so far participate in the exercise of the executive power. The appointment of ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not otherwise provided for in the Constitution, and which are established by law, shall be made by and with the advice and consent of the Senate; and the exercise of his "power . . . to make treaties" shall be "by and with the advice and consent of the Senate, . . . provided two-thirds of the Senators present concur."

§ 149. By the second Article and twelfth Amendment, certain duties are assigned to each of the two Houses separately, in relation to the choice of President and Vice-President. When the votes of the electors for those officers

[1] 6 Wheat., 204.

are counted, in the presence of the two Houses in convention, if no person has a majority of the whole number of electors appointed, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President; the votes to be taken by States, the representation from each State having one vote, and a quorum for the purpose shall consist of one or more members from two-thirds of the States, a majority of all the States being necessary to a choice. If no person have a similar majority of the votes of the electors for Vice-President, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose being two-thirds of the whole number of Senators, and a majority of the whole number being necessary to a choice. On the same principle that a quorum for ordinary business was decided, this quorum must be two-thirds of the Senators actually qualified and entitled to seats at the time. In regard to the House of Representatives, the expression is different. The quorum is a representation from two-thirds of the States, and a majority of all the States is necessary for a choice. There has been no direct decision by the House what this majority and quorum is; but it may be safely inferred, from the concurrent order of both Houses in relation to the election of 1865, that

the returns from certain States then in rebellion, and not represented in Congress, should not be received or counted; that the decision would be, if required to be made, that no State in rebellion, without representation in Congress, and without a republican government recognized by Congress as in subordination or conformity to the Constitution, could be considered for this purpose as a State within the Union, and counted in order to ascertain how many made a majority or two-thirds of all the States.

THE CONGRESS.

§ 150. The Senate and House of Representatives constitute the "Congress of the United States," in which are "vested" "all legislative powers granted" by the Constitution.[1] They shall assemble at least once in every year, and on the first Monday in December, unless a different day shall be appointed by law.[2] Every bill, order, resolution, or vote of Congress, requiring the concurrence of the two Houses (except on a question of adjournment), shall, before it becomes a law or shall take effect, be presented to the President of the United States. If he approve, he shall sign it; but, if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their Journal, and

[1] Section 1. [2] Section 7.

proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass it, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and, if approved by two-thirds of that House, it shall become a law, or valid Act of Congress, notwithstanding the President's objections. But, in all such cases, the votes of both Houses shall be determined by yeas and nays; and the names of the persons voting for and against the measure shall be entered on the Journal of each House respectively. If it shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be valid, in like manner as if he had signed it; unless the Congress, by their adjournment, prevent its return, in which case it shall not be so. It is said, that joint resolutions of the two Houses for directing the mode of proceeding in convention for counting the votes of the electors for President and Vice-President, adopting a uniform mode of organizing a new Congress, initiating and qualifying its members, regulating the mode of transacting business between themselves and with the executive, and proposing alterations of the Constitution,[1] do not require the action of the President, and need not be presented to him. An instance of the first was when the two Houses, by concurrent

[1] Hollingsworth *v.* Virginia, 3 Dall. Rep. 378.

resolution, in February, 1864, directed that certificates of votes given in certain States then in rebellion against the government (naming them), and then in the hands of the Vice-President, should not be opened by the Vice-President, nor laid before the Convention. Instances of the second kind are in the Joint Rules and Orders of the two Houses, and in the Resolution of March, 1866, by which the two Houses determined that neither House should consider the credentials of any man, presented as a member from a State lately declared to be in rebellion, until Congress shall have decided that such State is entitled to representation therein. The other kind was settled in the mode of adopting the thirteenth Amendment, and in the measures taken towards other amendments since.

CHAPTER XII.

LEGISLATIVE POWERS.

§ 151. The whole business and duty for ("in order to") which the government was "ordained and established," to execute the Constitution and accomplish its avowed purposes, is divided and distributed among the different departments. The three departments have independent duties, with commensurate powers, occupying the whole field of both, belonging to the government. The legislative portion devolved upon Congress is described by the words, "all legislative powers herein granted shall be vested in Congress."[1] What are these powers? It is obvious that the words "herein granted" are restrictive. "All legislative powers" generally, or power to make all laws, or even all laws consistent with natural rights and free government, according to the principles of universal political law, are not necessarily included, although what are included must conform to those principles. This grant is only a dividend or distributive share of the general

[1] Section 1.

powers and duties before assigned to the government, and of course cannot extend beyond the whole, of which they constitute only a part.

§ 152. What portion of the general powers of the government are legislative, within the meaning of our Constitution, depends on two considerations. 1st, Are they legislative, according to the principles of political law? or, 2d, Are they specially assigned by the Constitution to that department? If they are not adapted to aid in the execution of any of the avowed purposes of the people in the formation of their government, they are not "herein granted" at all, because they form no part of the general powers of the government. If they are so adapted, then they may be "herein granted" to the legislature, because they constitute a part of the general powers suited to effect those purposes. So, then, if they are legislative in their nature, they are "herein granted" expressly for that reason. If they are specially assigned to this department, then they are "herein granted," whether strictly legislative or not; because the Constitution, by so granting them to the legislative body, has made them legislative at least for this purpose.

§ 153. In short, the legislative power, as herein granted, is the power defined in the 8th section, to make all laws for executing the Constitution, and is co-extensive with the purposes and objects of the people in ordaining it. Legislative

power is the power to make laws. "All legislative power" is the power to make all laws or any laws. "All legislative powers herein granted" are the powers of making all the laws adapted to the execution of the duties hereby imposed on the government. It cannot mean merely the powers specially and expressly named elsewhere in the Constitution, because these are entirely inadequate even to initiate, and much more so to sustain and administer, the government. It cannot mean the enumerated powers, so called, or powers particularly conferred on Congress by specific provisions; for that would make the Constitution talk nonsense, by saying that the powers conferred on Congress shall be vested in Congress.

§ 154. The government possesses three different classes of powers: 1st, Those necessary to enable it to accomplish all the declared objects for which it was established, and execute the whole Constitution. 2d, Those specially devolved on the government at large, by particular provisions, — as the guarantee clause in Article IV., and the validity of debts and engagements in Article VI.; and, 3d, Those specially delegated to particular departments or officers. So far as these last are delegated to Congress, Congress has them, of course. So far as they are delegated to other departments or officers, or devolved on the government generally, and include or require the making of laws, the power

to make them is here conferred on Congress, because they are the legislative part of those duties; and the same afterwards conferred by the last clause of the 8th section, Article I. So that the "legislative powers herein granted," is just the power [no more, and no less] "to make all laws . . . necessary and proper for carrying into execution . . . all . . . powers vested . . . in the government, . . . or in any department or officer thereof;" which are just the powers of administering the government and executing the whole Constitution.

§ 155. The question whether a particular power is legislative or not, can arise only in deciding by which department it shall be exercised. Whether it belongs to the government or not, depends on the question whether it is legitimately adapted to the accomplishment of any of its avowed objects and duties. If it is, it must be exercised by the proper department. If it is not, it is of no consequence whether it is legislative or otherwise; for in neither case can it be herein granted. Nothing is "herein granted" to this department, or any other, but what is appropriate to the execution of the purposes of the Constitution; and every thing that is so, consistent with good morals and the fundamental principles of civil society, unless specially prohibited, is "herein granted." In the language of Chief Justice Marshall, "Let the end be legitimate, let it be within the scope of the

Constitution [its declared purposes], and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[1]

§ 156. Nothing can be made more plain, direct, and conclusive of this whole subject, than the last clause of the 8th section. Its exactness, comprehensiveness, and verbal accuracy, cannot be surpassed. By the 1st section, the legislative power is vested in Congress; and, by the 8th, it is logically defined to be "power to make all laws . . . necessary and proper [which has been held to mean appropriate or convenient] for carrying into execution . . . all . . . powers vested . . . in the government, . . . or in any department or officer thereof." This is broad, full, and explicit. It includes all the business of the legislative department, whether particularized in special grants to Congress, or dependent on the general or special duties of the government, or any of its departments or officers. Many special clauses assign particular duties to Congress, and many others make special regulations in regard to particular subjects, obligatory on the government; but specifying no particular mode of execution, any more than is done in regard to the general duties which embrace and cover them all. The principle on which the legislative duties of Congress is

[1] McCullough *v.* Maryland, 4 Wheat Rep.

founded, is the same in both cases. It is to make laws for executing the Constitution, or the powers of the government, whether general or special, though the general include all the special.

GENERAL.

§ 157. By the general powers of Congress is meant all those which devolve upon them, as the legislative or law-making department of the government, bound to the performance of that portion of all its duties, though not otherwise assigned to them. Legislative power is restricted by the general principles of free government; and the legislative power of Congress is limited also within the actual powers of the government under the Constitution.[1] But they are co-extensive with those powers, and may be applied to all the purposes and objects for which the government was instituted.

§ 158. They are co-extensive, because whatever is required of the whole government devolves directly upon the different departments. The government can act only through them. If particular objects and purposes of the government may be accomplished without legislation, the duty may devolve on one of the other departments; but, if legislation is needed, it

[1] Calder *v.* Bull, 8 Dall. Rep.; Fletcher *v.* Peck, 6 Cranch's Rep.; Terrett *v.* Taylor, 9 Cranch's Rep.; Argument of Jeremiah Mason, Case of Dart. Coll., p. 88; Wilkinson *v.* Leland, 2 Peter's R. 657.

must devolve on Congress, for they only can make laws. Congress is directly vested with all the legislative powers of the government, — all legislative powers herein granted, — that is, all the legislative powers of the Constitution. It grants no legislative power to any body else. What this legislative power so vested in Congress is, is exactly defined in the 8th section, to be a "power to make all laws . . . necessary and proper for carrying into execution . . . all . . . powers vested . . . in the government." The Constitution vests no legislative power in the State governments: all the duties it enjoins on the States, their officers, governments, or citizens, are only executory; and necessarily involve no legislative power any more than if they had all been enjoined on the Justices of the Courts, or the Sheriffs of the counties. The President, with advice, &c., "shall have power to make treaties," which, like the Constitution itself, are a part of the law of the land; but they are not an exercise of legislative power, any more than the Constitution itself is, but are expressly made executive acts; which may also, in some other cases, have the force of laws.

§ 159. Congress may therefore legislate or make laws to perfect the Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty; as well as for carrying into execution all the other and

more special provisions of the Constitution, so far as such legislation may be required, or have a tendency to effect any of those objects. The general duties above mentioned, which include all the others, have already been remarked upon; and in regard to the others it may be observed, that every precept, mandate, requirement, or restriction, and in fact almost every sentence of the Constitution, may, in some way or other, afford occasion for legislative action. Some of these call for particular attention.

§ 160. By Article I., section 2, "Representatives . . . shall be apportioned among the several States, . . . according to their respective numbers," and cannot in all exceed one for every thirty thousand. But the whole number must be ascertained before it can be divided or apportioned. This is the mandate of the Constitution, and of course the supreme law of the land. The duty of executing it, as well as all the rest of the Constitution, rests upon the government created for that purpose. The powers and duties of the government are distributed among three departments. No special authority is here given to Congress, any more than there is in the other precept, "to establish justice." But the duty enjoined upon the government demands legislation, and "all the legislative powers of the government are vested in Congress." It follows necessarily, that, on this and all other subjects similarly situated, Congress must act, and "make

all laws . . . necessary and proper for carrying into execution [this] and all other powers vested by this Constitution in the government . . . or any department or officer thereof."

§ 161. Accordingly we find that such has been the uniform practice of the government. The Constitution itself regulated the aggregate and the apportionment for the first Congress; but since that we have never been without a law, duly enacted by Congress, regulating the subject. This duty, being legislative, would necessarily devolve upon Congress, if left precisely as it stands in the 2d section, without further provision. But it may be considered as granted in the 4th section, as a part of the power for regulating elections, — prescribing the manner of them. No election of Representatives can take place, without knowing how many are to be voted for; and, if this cannot be settled under any other power in the Constitution, it might be settled under the authority of this section, though it is one of the necessary items in the "manner of holding elections," which the State legislatures could not prescribe even provisionally.

§ 162. Many other duties are imposed on the government in a similar manner; that is, without any designation to which department they may belong: and they are left to the action of the government, through the appropriate department. By section 9, "A regular statement and

account of the receipts and expenditures of all public money shall be published from time to time." By Article II., "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected;" and, by Article III., "The judges . . . shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." The 2d section of Article II., recognizes "the executive departments," but makes no provision for their number, organization, or duties. So Article III. establishes the "Supreme Court," and vests in it the "judicial power of the United States," but makes no provision for its organization, or the mode of executing its duties. By Article IV., "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" and Chief Justice Taney says,[1] "These privileges and immunities, for greater safety, are placed under the guardianship of the general government." By the same section, fugitives from justice and from labor are to be delivered up; but it is not said how or by whom. They are in no custody. By section 4, "The United States shall guarantee, to every State in this Union, a republican form of government." By Article VI., "The Senators and Representatives before mentioned, and

[1] 16 Peters' Rep. 686.

the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution." How, when, by whom; by what authority; in what form; how, where, and by whom recorded and preserved?

§ 163. Of the same nature are all the provisions of the Constitution, prescribing certain duties to the States, as political bodies, their governments, officers, or people, as such, in their official or corporate capacity. "Representatives shall be . . . chosen . . . by the people of the several States." Then the people must choose them. If this is their duty, they certainly have the power, — the elective franchise, the right of suffrage. "Each State shall have at least one Representative." This is not merely permissive. "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." — "Senators . . . shall be . . . chosen by the legislature" of each State. — "Each State shall appoint . . . electors" of President, and "the electors shall meet" and perform their duties as the Constitution directs. "The Judges in every State shall be bound by the Constitution and laws of the United States."

§ 164. Mr. Madison truly says,[1] "The powers of the new government will act on the States

[1] Federalist, No. 40.

in their collective characters." But how act, except through laws regularly made to enforce the Constitution? Mr. Hamilton says, "The States, as well as individuals, are bound by these laws."[1] In Martin *v.* Hunter,[2] the Court say, "It is a mistake, that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States, in some of the highest branches of their prerogatives. . . . The language of the Constitution is imperative upon the States, as to the performance of many duties. It is imperative upon the State legislatures to make laws, &c. . . . The legislatures of the States are, in some respects, under the control of Congress; and in every case are, under the Constitution, bound by the paramount authority of the United States."

§ 165. These are all parts of the supreme law of the land, and as such to be executed by the government. No special duty in regard to any of them is assigned to Congress or any other department. But all of them require the enactment of laws for their enforcement; and Congress has the whole legislative or law-making power of the government. Congress has accordingly made laws relating to most of these subjects, and might very profitably make many more. The duty of Congress to legislate, in all this class of cases, was first settled by them-

[1] 2 Elliot, 362. [2] 1 Wheat. R., 304.

selves, in the first statute passed under the Constitution. It related to the oaths to be taken by the State officers, and has remained in force during the whole history of the government. It was objected to on its passage, for the want of power in Congress. But the objection was overruled; and the principle has been universally approved and practised upon ever since. It was acted upon in the statute relating to fugitives from justice and from labor; and the Supreme Court have decided, that Congress not only had the power to legislate upon it, but that their power was exclusive.[1]

§ 166. This last statute, however, so far as respects fugitives from labor, though it said not one word about slaves, but followed the words of the Constitution, applying to "persons held to labor" under State laws, which of course must be constitutional laws or they are no laws, came practically, by the same sort of perversion that was successfully applied to other parts of the Constitution for the same purpose, and without any judicial examination or decision, to be applied almost exclusively to Southern slavery, or persons held forcibly in bondage, contrary to the Constitution and all legal as well as moral right. It has consequently, with slavery itself, been abolished; and legislation on all these subjects, and all others covered by the Constitution and within the purposes of the fundamental law of

[1] 16 Peters' Rep., 636.

the land, is authorized, by its fitness and adaptation "for carrying into execution . . . all the powers vested by this Constitution in the government of the United States."[1]

[1] In the debate on the National Bank in the House of Representatives, Feb. 2, 1791, Mr. Madison, commenting on the words *necessary* and *proper*, said, "These two words had been by some taken in a very limited sense, and were thought only to extend to the passing of such laws as were indispensably necessary to the very existence of the government. . . . He wished the words understood so as to permit the adoption of measures the best calculated to attain the ends of government, and produce the greatest *quantum* of public utility. In the Constitution, the great ends of government were particularly enumerated; but all the means were not, nor could they be, pointed out, without making the Constitution a complete code of laws. . . . The more important powers are specially granted; but the choice from the known and useful means of carrying the power into effect, is left to the decision of the legislature. . . . No power could be exercised by Congress, if the letter of the Constitution was strictly adhered to, and no latitude of construction allowed; and all the good that might be reasonably expected from an efficient government entirely frustrated."

Mr. Lawrence, of New York, who followed in the debate, said, "The principles of the government, and ends of the Constitution, were expressed in its preamble. It is established for the common defence and general welfare. The body of that instrument contained provisions the best adapted to the intention of those principles and attainment of those ends. To these ends, principles, and provisions, Congress was to have a constant eye; and then, by the sweeping clause, they were vested with the power to carry the ends into execution."

It has already been shown, that the distinction of *preamble* and *body* of the Constitution does not exist. What Mr. Madison calls the "great ends of government . . . particularly enumerated," and Mr. Lawrence "the ends of the Constitution," are those mentioned in the enacting or introductory clause, and are to be attained, according to these gentlemen, through the power of Congress to make all laws necessary and proper for these purposes; because all the means were not, and could not, be pointed out. This debate took place when Mr. Madison was a friend of Washington, and a supporter of his Administration. The difference of tone in some of his subsequent writings will be apparent.

The power of the government to execute the Constitution, at least so far as respects the subject of personal liberty or slavery, is now [1865] effectually put at rest by the thirteenth Amendment, abolishing slavery, which expressly authorizes Congress to "enforce" that Article by appropriate legislation.

CHAPTER XIII.

LEGISLATIVE POWERS. — GENERAL.

§ 167. THE cases referred to in the last two sections being leading cases, both in the legislative and judicial departments of the government, are deserving of particular attention, and ought to be stated more at length; especially since they were the original, and remain the permanent, decisions of the right and duty of Congress to make laws for the execution of the general provisions and regulations of the Constitution, — really of the whole instrument, as well as of those parts of it more expressly assigned to them by particular and specific mandates. When it is said Congress may "borrow money on the credit of the United States," it is well understood that they may borrow and promise to pay, "issue bills of credit," in the name of the United States, and that such bills or promises are legal and valid in the hands of any lawful owner thereof; and the government acts accordingly.

§ 168. But when it is said, "No State shall . . . emit bills of credit," what is understood by it,

and who understands it? Does it mean that a State cannot promise to pay or make a bill of credit,—that such a bill or promise is illegal and void, not transferable by delivery or otherwise, and gives no rights to the lawful holder? May a State borrow money and contract debt to any amount, without limitation, of anybody, citizen or alien, for any purpose, lawful or unlawful, loyal or treasonable, and then pay or repudiate as they please? Is this restriction expected to execute itself, or is each State to construe and execute it or not, as they please? It is certain the United States are bound to "protect each of them against invasion," in all the iniquity they may be allowed to commit. Has the government, then, no rights or duties to perform, in reference to this and other restrictions under which the Constitution has placed them?

§ 169. When the Constitution says, "Representatives . . . shall be apportioned among the . . . States . . . according to . . . numbers," has Congress any thing to say on the subject? If not, who has? When it is required that "the Judges in every State shall be bound . . . by the supreme law of the land," has the government no responsibility in the matter? The whole matter amounts only to this: Is the government bound to execute the Constitution; and is Congress, as the legislative department of the government, bound to make all laws necessary and proper for carrying it, and every part of it, into

execution? This question was fairly raised, discussed, and settled, by the respective tribunals, in these two cases; and the answer has been recognized ever since.

§ 170. The first was on the passage of the Act of June 1, 1789, the first legislative Act of the government, entitled "An Act to regulate the time and manner of administering certain oaths." The Constitution[1] provides that certain officers of "the United States and of the several States shall be bound by oath or affirmation to support this Constitution." It prescribes no oath in form; no time, place, or manner of taking it; no authority for administering or recording it; no mode of proving it; and no penalty for avoiding or violating it. It assigns no special duty to the government, or any department of it. The bill was reported in the House by a committee, of which Mr. Madison was a member, with a penal clause; which was afterwards omitted on the ground that taking the oath was a necessary qualification for office, the omission of which would render void all official acts of the officer. Nevertheless, the Act was objected to for want of adequate power in Congress.

§ 171. Mr. Gerry said, "There is no provision for empowering the government of the United States, or any officer or department thereof, to pass a law obligatory on the members of the legislatures of the several States, or other offi-

[1] Article VI., section 3.

cers thereof, to take this oath. This is made their duty by the Constitution, and no such law of Congress can add force to the obligation; but on the other hand, if it is admitted that such a law is necessary, it tends to weaken the Constitution, which requires such aid. Neither is any law, other than to prescribe the form of the the oath, necessary or proper to carry this part of the Constitution into effect; for the oath required by the Constitution, being a necessary qualification for the State officers mentioned, cannot be dispensed with by any authority whatever, other than the people and the judicial power of the United States, extending to all cases arising in law or equity under this Constitution. The Judges of the United States, who are bound to support the Constitution, may, in all cases within their jurisdiction, annul the official acts of State officers, and even the acts of the members of the State legislatures, if such members and officers were disqualified to do or pass such acts, by neglecting or refusing to take this oath."

§ 172. The objection of "no provision for empowering the government," &c., was just as applicable to the bill in relation to United-States officers, as in relation to State officers; but it was made only in reference to State officers, and on the ground of interference with State rights. What Mr. Gerry intended was to deny the general power of the government, as the agent of

the people, to administer and execute the Constitution, — the supreme law. It is the same objection afterwards made by Mr. Madison and Mr. Monroe in their veto messages, as elsewhere cited, that they could not find, in the enumerated powers, the specific power to pass this particular measure. Mr. Madison reported and sustained this bill; but he afterwards obtained more light respecting State sovereignty.

§ 173. The objection was specially answered by Mr. Lawrence, of New York. "Only a few words will be necessary to convince us that Congress have this power. It is declared by the Constitution, that its ordinances shall be the supreme law of the land. If the Constitution is the supreme law of the land, every part of it must partake of this supremacy; consequently every general declaration it contains is the supreme law. But then these general declarations cannot be carried into effect without particular regulations adapted to the circumstances; these particular regulations are to be made by Congress, who, by the Constitution, have power to make all laws necessary or proper to carry the declarations of the Constitution into effect. The Constitution likewise declares that the members of the State legislatures, and all officers, executive and judicial, shall take an oath to support the Constitution. This declaration is general; and it lies with the supreme legislature to detail and regulate it."

§ 174. This answer was substantially endorsed by Mr. Bland, Mr. Bowdinot, Mr. Sherman, and others, and was apparently satisfactory to everybody; for the bill was passed into a law, so far as appears, without division, in both Houses; approved by President Washington; has been practised upon during the whole existence of the government; and still remains in force. It has not proved to be adequate to all the purposes for which it was intended; but it settled the objection to the power of Congress, and ought to have silenced all similar objections to the execution of every right, precept, principle, or requirement, in any part of the Constitution.

§ 175. The other case arose in the Supreme Court of the United States, on the Act of February, 1793, which was enacted in order to carry into execution two provisions of the second section of Article IV., relating to fugitives from justice and from labor. These provisions recognize rights, and prescribe duties and prohibitions to States, officers, and people; but, like the above clause in Article VI. and many other parts of the Constitution, neither supply the means of maintaining and enforcing them, nor allude to any other authority, State or national, to be resorted to for the purpose. The Act, so far as it respects fugitives from justice, has been in quiet operation and unchallenged, ever since its date, and is still in force.

§ 176. But the section relating to fugitives

from labor, though resting on the same principle so far as the power of Congress is concerned, was impeached for the want of any such power, and brought under judicial examination in Prigg's case.[1] The Supreme Court unanimously sustained the constitutionality of the Act, on the express ground of the duty of Congress to legislate for the execution of that part of the Constitution; and a majority of the Court held further, that the power was exclusive of any State legislation on the subject.

§ 177. The Court say, "It has been argued, that the Act of Congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body; and therefore it is void. Stripped of its artificial structure, the argument comes to this, that although rights are exclusively secured by, or duties exclusively imposed upon, the national government, yet, unless the power to enforce these rights or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any Act of Congress, and must operate solely *proprio vigore*, however defective may be their operation, — nay, even although, in a practical sense, they may become a nullity for the want of a proper remedy to enforce them, or to provide against their violation. If this be the true inter-

[1] 16 Peters' Rep.

pretation of the Constitution, it must, in a great measure, fail to attain many of its avowed and positive objects as a security of rights and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted as correct, either in theory or practice. No one has ever supposed, that Congress could constitutionally, by its legislation, exercise powers or enact laws, beyond the powers delegated to it by the Constitution; but it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, or duties expressly enjoined, thereby. The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end."

§ 178. The Court proceed to cite several familiar instances of legislation where precepts are given, but no legislation expressly provided for; and then add, "These cases are put merely by way of illustration, to show that the rule of interpretation, insisted upon at the argument, is quite too narrow to provide for the ordinary exigencies of the national government, in cases where rights are intended to be absolutely secured, and duties are positively enjoined by the Constitution." . . . "We hold the Act to be clearly constitutional in all its leading provisions." . . . "The national government, in the

absence of all positive provisions to the contrary, is bound, through its proper departments, legislative, judicial, or executive, to carry into effect all the rights and duties imposed upon it by the Constitution." On some of the points raised and argued in the case, there was a difference of opinion among the Judges. But in regard to this leading doctrine of the power and duty of Congress, by the necessary and appropriate legislation, to carry into execution this clause of the Constitution as well as all the rest, no difference of opinion was expressed or intimated by any member of the Court.

CHAPTER XIV.

LEGISLATIVE POWERS. — GENERAL.

§ 179. The 2d and 4th sections of Article IV., requiring more particular examination, may be appropriately considered here, under the head of the General Powers of Congress. The 2d section, in three consecutive sentences, disposes of three distinct and important subjects; giving the supreme law on each, without any details of the mode or means of execution, and without any reference to future legislation for supplying them in either case. The first is, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The citizens of each State in the Union, whether natural-born or naturalized citizens, are *ipso facto* citizens of the United States. Or, rather, every citizen of the United States is, by virtue of such citizenship, a citizen also of every State in the Union, and entitled to all the privileges and immunities thereof. He is entitled to all the rights and privileges guarantied or recognized by the Constitution, independent of this clause,

as well as by it; and, in addition to them, he is also entitled, by this clause, to all the privileges and immunities which may be held or exercised exclusively under, and by virtue of, the Constitution and laws of any State in this Union.

§ 180. These are, at the least, a right to actual membership of the community, whenever they may choose to exercise it, and a right to participate in all the benefits intended to be guarded and secured thereby. The value of these, or any other rights under State constitutions and laws, will surely not be questioned by State-rights men; and, if they exist, they appertain, by this provision of the Constitution, and are of equal value to one citizen of the United States as to another, who will put himself in a position to need and to use them on the same terms. Whatever they are, they are expressly granted by this clause to the citizens of every other State; and thus are made constitutional rights, protected and secured by that instrument, and placed, in the language of Chief Justice Taney, "under the guardianship of the general government." These "privileges and immunities," whether originally natural, personal, or common-law rights, or civil and political rights, all become, by this guaranty, legal rights secured by the Constitution to every citizen of the United States.

§ 181. The clause itself, however, supplies no means for its own execution, and directly in-

vokes no legislative aid from Congress. For more than three quarters of a century, without any legislation or governmental action of any sort, it stood a perfect dead letter in the Constitution; not only without an attempt at enforcement, but almost without enough of sympathy for the oppressed, to raise a complaint on account of the want of it. During this time, some of the States, directly in the face of this provision, actually, practically, and persistently denied to one half of their own citizens any rights whatever, natural, civil, or political, under the Constitution of the United States or of their own State, by the laws of God or man; and sold them in the market like cattle.

§ 182. In one instance, an authorized agent of a sister State was sent into another, for the modest purpose of instituting legal proceedings in their own Courts, in order to test the constitutional validity of some of these violations of right; but was debarred from executing his mission, and forcibly expelled from the State, contrary to law and without remedy.

§ 183. But, on the 9th of April, 1866, a statute was enacted for executing this part of the Constitution; not, however, without running the gauntlet of an executive veto. The veto, however, did not deny the constitutional power of Congress to legislate on the subject for this purpose, but substantially admitted it, by promising "cheerfully to co-operate with Congress

in any measure that may be necessary for the preservation of the civil rights of . . . all . . . classes of persons throughout the United States." The President's objections were to the details of the bill. As they were all overruled by more than a two-thirds vote of both Houses of Congress, it is unnecessary to discuss them.

§ 184. The statute begins by declaring the citizenship of "all persons born in the United States." The truth of this declaration will hardly be called in question at this late day. It was true before the people became a separate nation. It was true by the common law afterwards, and before the Constitution was adopted. It was made so true by the terms of the Constitution itself, that it was found necessary, in order to diminish the effect of the principle, to insert an express disfranchisement of a portion of the native Indians. So it was true, independent of the statute; and, if it had not been, it is made absolutely true by the statute. The fact loses none of its importance by having been a pre-existing fact. The statute is a distinct recognition and re-enactment of it, by the supreme law-making power of the government, and carries along with it all the rights and duties which the fact includes.

§ 185. If a man is a citizen, he has all the attributes of a citizen, entitled to all the rights, and liable to all the duties, of citizenship; and the whole is covered by the same law that asserts

the fact. A statute may enlarge his rights, or add to his duties. It may perhaps diminish or remit a portion of his constitutional duties; but it cannot abate or abrogate any portion of his constitutional rights. This statute does not attempt to do either; but it specifies certain rights particularly, which, whether they are broader or narrower than those recognized in the Constitution as appertaining to all citizens, cannot at any rate disparage any that may be omitted. The statute expressly specifies, that he "shall have the . . . right, in every State and territory, . . . to the full and equal benefit of all laws and proceedings for the security of person and property;" and, by declaring him to be a citizen, it necessarily entitles him "to all privileges and immunities of citizens in the several States," whether they are guarantied by the States themselves or by the United States, and whether they are pre-existing rights independent of the statute, or rights now for the first time conferred by the statute.

§ 186. The 2d section of the statute prescribes the remedy, and is equally broad with the first. It extends "to the deprivation of any right secured or protected by this Act." Now, whether all the constitutional rights of citizenship are granted by this Act or not, there is no room to doubt that they are all intended to be secured and protected by it; and, so far as its provisions may be effectual for the purposes in-

tended, they will be so. We do not mean to anticipate any failure in this respect; but if, in the progress of its administration, any practical difficulties should be encountered, rendering it inadequate to the plenary accomplishment of its purposes, we trust the defect will be promptly and speedily supplied by future and more efficient legislation, and by a corresponding energy in the execution.

§ 187. The second subject of this 2d section is Fugitives from Justice. In regard to them, the constitutional provision is, "A person charged, in any State, with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." This clause, like the one preceding and succeeding it, as well as many others, is destitute of any special provision authorizing Congress to enact laws for its execution; and its execution was at first attempted without any legislation whatever. In 1791, a free man was seized in Pennsylvania, where he belonged, carried into Virginia, and sold there as a slave. The offender was indicted in Pennsylvania, and, by the authority of the Governor, demanded for trial and punishment from the Governor of Virginia, where he was found, and the delivery refused. The Governor of Virginia, by the advice of his Attorney-

General, held that the clause gave him no authority to seize and transport a man from Virginia to Pennsylvania for such a purpose, and he had none otherwise.

§ 188. The Governor of Pennsylvania sent all the papers to the President, who laid them before Congress, and they thereupon passed the Act of Feb. 12, 1793. It is thereby enacted, that "it shall be the duty of the executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent;" with other appropriate provisions for his transportation to the place from whence he fled, and for the punishment of any forcible interference therewith. These provisions have been in actual practical use in every State in the Union, from the time of their enactment till the present, and are still in full force. So far as is known, the power of Congress to make them has never been doubted or questioned by anybody.

§ 189. The phrase, "a person charged," is understood by the statute technically; and a duly authenticated copy of the indictment, or affidavit before a magistrate, by which the charge is made, is to be produced as the foundation of the demand; and then the statute addresses itself to

the executive authority of the State as a part of the machinery of the government, and deals with it, as the Constitution does with the States themselves, their governments, and people, as subjects bound to obey, and, if need be, to assist in the administration of the supreme law of the land. The existence and continuance of this statute, on a subject in constant use, and with universal acquiescence, in addition to many others elsewhere cited of a similar character, affords the strongest possible evidence of the general understanding, that the power and duty of Congress authorize and require them to legislate for the enforcement and execution of every part of the Constitution, and particularly of every precept, right, principle, or prohibition it contains. There never has been any question in regard to their duty to legislate for the execution of this provision of the Constitution, nor in regard to the validity and constitutionality of the provisions of this particular statute for that purpose.

CHAPTER XV.

LEGISLATIVE POWERS. — GENERAL.

§ 190. The third and last subject of this second section is Fugitives from Labor. The provision is of the same character with the two preceding ones, in respect of means of execution and invocation of special legislative power. It is in these words: "No person held to service or labor in one State, under the laws thereof, escaping to another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

§ 191. The Convention had been engaged, from May to August, in discussing and amending the Virginia Plan. They had successfully encountered and settled the vexed questions, between a government proper of the people, and a confederation or league of States; the relative power or position of the individual States in the new government; and the rule of apportionment of representation and direct taxation, by num-

bers, without regard to race, color, or descent. But the Virginia Plan introduced no subject that necessarily involved the consideration of slavery; so that, thus far, slavery, whether by law or against law, was unknown to the Constitution. The original fifteen Resolutions, introduced by Mr. Randolph, had expanded, under the hands of the Convention, to twenty-three distinct propositions, which, at the end of that time, went into the hands of the Committee of Detail, to "report a Constitution conformable thereto."

§ 192. The South-Carolina Plan also, without any examination or sanction of the Convention, and without instructions, went into the hands of the same committee, of which Mr. Rutledge, of South Carolina, was chairman. The South-Carolina Plan contained provisions limiting the commercial power, prohibiting the taxation of persons or exports, and requiring the rendition of fugitives, — all subjects looking directly to the condition of slavery, the proceeds of slave labor, and the continuance of the slave-trade. None of these subjects had been discussed in the Convention; but, the day before the committee were appointed, General Pinckney forewarned the Convention, that, if the committee should fail to provide security against the emancipation of slaves and the taxation of exports, he should oppose their report.

§ 193. The Convention had the benefit of this hint in the selection of their committee, and the

committee had it also in the prosecution of their labors. Their draft of a Constitution followed the form of the South-Carolina Plan entirely, and, in most respects, the substance also; interweaving or modifying it by the principles already sanctioned by the Convention, and others taken either from the Articles of Confederation or other plans before them, or originated by themselves. This draft became the basis of all the subsequent proceedings of the Convention. The subjects above mentioned, bearing on the interests of slavery, were dealt with by the Committee of Detail as follows: —

§ 194. In the *South-Carolina* Plan, "No tax shall be laid on articles exported from the States; nor capitation tax, but in proportion to the census before directed." — "All laws regulating commerce shall require the assent of two-thirds of the members present in each House." — "Any person charged with crimes in any State, fleeing from justice to another, shall, on demand of the executive of the State from which he fled, be delivered up, and removed to the State having jurisdiction of the offence."

§ 195. In the Report of the *Committee of Detail*, "No tax or duty shall be laid by the legislature on articles exported from any State, nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited." — "No capitation tax shall be

laid, unless in proportion to the census hereinbefore directed to be taken." — "No navigation Act shall be passed without the assent of two-thirds of the members present in each House." — "Any person charged with treason, felony, or high misdemeanor, in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the executive power of the State from which he fled, be delivered up, and removed to the State having jurisdiction of the offence."

§ 196. In regard to the items of taxation on persons and exports, the Committee adopted the views of South Carolina, which now form a part of the Constitution.[1] As to commercial regulations, the Committee modified the South-Carolina claim to a positive prohibition of laws restraining "the migration or importation of persons," by taxation or otherwise; and requiring a two-thirds vote for navigation laws. The difficulty on this subject was afterwards adjusted in the Convention, by striking out the restriction on navigation laws, and limiting the prohibition in regard to the importation of persons to twenty years, with a ten-dollar tax, as in Article I., section 9.

§ 197. The South-Carolina claim, in regard to rendition or extradition of persons "charged with crimes in any State," so far as it related to the interests of slavery, resulted in the last clause of Article IV., section 2, now under considera-

[1] Article I., section 9, cl. 4 and 5.

tion. The terms of the provision in their Plan were studiously broad, so as to include any thing that any State might choose to call a crime; not limited to offences *mala per se*, but extending to *mala prohibita* also; so that, by virtue of it, they could as well reclaim a runaway slave as an absconding murderer.

§ 198. The Committee of Detail, for reasons which are altogether inexplicable, considering the manner in which they treated the rest of the above series, changed the phraseology of the clause from "charged with crimes" to "charged with treason, felony, or high misdemeanor;" thus limiting its operation to offences *mala per se* at least, and leaving out all *mala prohibita*, or mere nominal and artificial crimes. It was at first attempted to evade the effect of this change, by striking out the words "high misdemeanor," and inserting the words "other crime," on the ground that the former words had "a technical meaning too limited . . . to comprehend all proper cases." But it was soon perceived that this could not answer the purpose. "Treason, felony, or other crime" might embrace other crimes of a nature similar to those named, but could not, on the principles of law, be extended to minor offences, of a totally different character and grade.

§ 199. Whereupon South Carolina moved directly to require "fugitive slaves and servants to be delivered up like criminals." This was

resisted, on the ground that it must then be done at the public expense, and there was no more reason for the public being called upon to seize and surrender a runaway slave or servant, than a runaway horse. It would also have been a direct recognition and legalization of slavery or property in man, by putting it into the Constitution *eo nomine*. The proposition was then withdrawn, in order to prepare a particular provision, independent of the clause regarding fugitives from justice.

§ 200. This was presented and adopted the next day, Aug. 29, in the following form: "If any person *bound* to service or labor in any of the United States shall escape into another State, he or she shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape, but shall be delivered up to the person *justly* claiming their service or labor." The words "bound to service or labor," by which they intended to include slaves, *inter alios*, were used with reference to the ordinance of July 13, 1787, which was passed by Congress near seven weeks before, the words of which, describing a subject for reclamation, were "any person . . . from whom labor or service is *lawfully* claimed." It has been argued, that this similarity of action by Congress and the Convention, so nearly simultaneous and unanimous in both, carries evidence of consent and compromise among the different

parties in both bodies. But, if that was the case, why the attempt first made to smuggle through the extradition of a runaway slave, under the name of a "person charged with crimes;" and, failing this, then the bold and defiant proposition to write SLAVERY bodily, on the face of the Constitution?

§ 201. Or rather, why not take the provision itself, supposed to have been agreed upon, and transfer it to the Constitution, in the very terms of the ordinance? But, after the failure of the first two attempts, and an adjournment for preparation, an entirely new proposition is introduced, as above. It avoided the objection, that the reclamation must be made by the executive authority of the State from which the escape was made, and at the public expense; and did not sanction slavery, by a recognition of it as a legal or constitutional *bond* to service or labor. It still left the legality of the *bond*, the fact of the *escape*, and the *justice* of the claim, — that is, the title of the claimant, — as traversable facts, to be inquired into and decided, wherever it should be attempted to enforce the claim.

§ 202. In this condition, ten days afterwards, it went into the hands of the Committee of Revision, who reported it in a new draft, Sept. 12, as follows: "No person legally held to service or labor in one State, escaping into another, shall, in consequence of regulations subsisting therein, be discharged from such service or labor,

but shall be delivered up, on claim of the party to whom such service or labor may be due." This still left the three main facts above mentioned most palpably open to inquiry: 1. The constitutional legality of the original *holding to service*, whether by *bond*, apprenticeship, marriage, slavery, or otherwise; 2d, The *escape*, or wilful and unjustifiable abrasion of legal duty; and, 3d, The valid title of the present claimant.

§ 203. All these inconvenient and disagreeable inquiries it was the distinct purpose of the slaveholders to forestall. Accordingly, the clause was subjected to further alterations in the Convention, from which it came out, not till the day of the final engrossment of the Constitution, in the shape in which it now stands. It had before become known and acquiesced in, as the settled determination of the Convention, not to legalize or recognize slavery, or the right of property in man, in any form. Only two days before this final disposal of the subject, the word *service* had been substituted for *servitude* in the 2d section, on this account. And this by a unanimous vote.

§ 204. The phrase *held to service*, or *bound to service*, being identical and used indiscriminately, is elsewhere in the Constitution expressly applied to freemen,[1] and, of course, could not mean slaves, in distinction from freemen. In every

[1] "Free persons, including those bound to service for a term of years." — Article I., section 2, cl. 3.

instance where words or phrases used in the Constitution are claimed to mean *slaves*, they certainly include, and were intended to apply to, those who were not slaves; and so are not identical, equivalent, appropriate, or adequate to designate that or any other particular class exclusively. They cannot show that any such class was in fact known even to exist; much less can they be adduced to prove that such a *status* was admitted to be lawful, or constitutionally approved or sanctioned.

§ 205. The first time such a phrase is used in the Constitution is in section 2 of Article I., where they are "*other persons*" than freemen, without defining freemen, whether they are citizens or aliens, natural-born or legally admitted, or otherwise constituted such, but expressly including a portion of those "*bound to service;*" so that *bound to service* cannot mean slaves, for a portion of them are *free;* and *other persons* cannot mean slaves, for a portion of them are *bound to service* and *freemen*. These *other persons* are, at the same time, a part of the "people of the State," to whom the representation is assigned, and on whose numbers it is apportioned.

§ 206. In the next instance,[1] they are called "such persons" as any of the States may think proper to admit, without regard to *status*, or any other quality; and there can be no more ground for claiming that they mean slaves exclusively,

[1] Article I., section 9.

than that they mean men, women, children, or adults, or any other description of persons. In the last instance, they are "persons held to service" by local law; which of course must be law in conformity to, or compatible with, the Constitution, or it can be no law. So that all of them leave the question of a constitutional sanction of slavery just where they found it, without any affirmative answer. "Held to service" is also spoken of as a *debt due;* which cannot apply to a slave, who, having no freedom or will, can contract no obligation, or owe any thing; and, having no rights, can discharge no debts.

§ 207. The obvious intention of the studied phraseology in which the clause now appears, — originally made, then altered and re-altered, by the slaveholders themselves, — was to place the whole subject *de hors* the Constitution entirely, and leave it in the hands of the local authorities only. If *held to service* did not mean *slave,* they could make *slave* mean *held to service;* and they did. As they made the law themselves, they could make such *service* legal, under what name they pleased. As the *escape* was an offence against local law, it must be judged of and decided by local law. The State *ad quem* was prohibited from making any discharge, and the party pursued was to be delivered up to his pursuers, armed with the same local law of the slaveholders, by anybody and everybody to whom he might resort for protection. We have here

the foundation of the claim of which we have all heard so much, and so long, and so constantly, that SLAVERY, not *holding to service*, is a subject that belongs exclusively to the jurisdiction of the States; and that the general government has no right even to consider it, or do any thing about it.

§ 208. But they soon discovered that in all this there was manifest error. The provision was worth nothing to the slaveholders, and they found that they could turn it to no practical account, without the use of a magistracy and legal authority in the free States; and that a free-State magistracy would not be governed by slave laws. The consequence was, that they lost no time in making the next important discovery, which was, that the United States had something to do with it; and, inasmuch as the provision was in the Constitution, it was the supreme law of the land; and as such it was the duty of the government to construe and administer it. So they called upon Congress to legislate on the subject. The slaveholders could not manage the free-State magistrates; but they could manage Congress, and they immediately passed the Act of Feb. 12, 1793, to carry out their wishes.

§ 209. We have seen that before this time Congress had substantially determined to do nothing for the amelioration of the condition of the slaves in any of the States, or even to receive any petition from them. They were now boldly

called upon by the masters to assist in the oppression of that feeble race; and they yielded a ready assent. They did not, however, by this act, undertake to say that a person involuntarily and forcibly held as a slave under an unconstitutional State law, was "a person [lawfully] held to service or labor," or from whom "service or labor" was legally "due," within the meaning of the Constitution; or even that this clause of the Constitution, or any other, recognized or applied to slavery at all. It is worthy of note, that this statute is expressly made applicable to the Northwest Territory, where slavery was impossible, having been prohibited by Congress itself, in reenacting the Ordinance of 1787.

§ 210. They first followed the words of the Constitution, "held to labor" (leaving out *service*), "escape," and "due," and left their legal meaning and constitutional application, the fact and the law of the whole case, to the slaveholder himself; to be decided, if he pleased, by his own or any other affidavit, in the same loose and general phrase, before a magistrate selected and paid by himself; and without saving even the poor right of appeal to the miserable victim, who could have no means to resist or object to any thing. But, lest by possibility he might still have the ghost of a chance to escape from a decision so made, any person who should obstruct its execution, or conceal or harbor, or probably feed him, — for he could hardly be fed without

being harbored somewhere, — shall forfeit five hundred dollars to the slave-catcher.

§ 211. It might have remained doubtful to this day, whether human ingenuity could concoct a statute more inhuman, barbarous, and unconscionable than this, had it not been for the additional provisions of the Act of 1850. Under such circumstances, it is not difficult to see how the words of the Constitution, "person held to service," and from whom "such service may be due," — which had been carefully selected and adopted because they did not mean "slave," and could not be applied to one held only by force and without right, — had, without any judicial examination whatever, been made to mean just exactly "slave," and nothing else.

§ 212. It was because one party only was permitted to have any voice in the matter, and he was allowed to make the construction to suit his own interest and pleasure. He did this so effectually, that, at the end of half a century, in 1842, when the words, for the first and only time, came under judicial cognizance, in Prigg's case, their true construction and real meaning, which was the only constitutional question worth considering presented by the case, was so completely lost sight of, as not to be mooted, or even alluded to, by the Court or counsel, during the whole argument. Judge Story, in delivering the opinion of the Court in that case, says, "It is well known, that the object of this clause

was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property, in every State in the Union;" and he takes this as the foundation of his opinion in the case. Now, if any thing is, or ever can be, well known, in regard to the intentions of that Convention, it is that they were determined to say nothing about the right of property in a slave, and did say nothing about it; and that the circuitous phraseology of this clause was invented by the slaveholders, because they could not overcome that determination, on purpose to evade it; which they did effectually.

§ 213. So the clause stood on the slaveholders' construction only, not even endorsed by Congress, till the repeal of the Missouri Compromise, the Dred-Scot decision, and the invasion of Kansas, so turned their heads, as to induce a belief that the government was so weak, and its friends so indifferent or inefficient, that they could cancel and destroy the Constitution, and incontinently sweep the whole government by the board with a besom. Then they rushed directly into rebellion, leaving the government to the sole care of its friends; when all the laws for construing or executing this part of the Constitution, together with slavery itself, rebellion and all were speedily squelched together.

CHAPTER XVI.

LEGISLATIVE POWERS. — GENERAL.

§ 214. The 4th section of this fourth Article is another instance of most important powers, which must be executed by Congress, and cannot be done without them, and yet in which there is no express call made upon them to do any thing. "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence." The duty here enjoined is upon the United States, the whole government, like the duty to execute the Constitution. But that portion of it which requires or admits legislation necessarily devolves upon Congress, as the legislative department, and having all its legislative power. It necessarily belongs to Congress also; because, by special and specific provisions, Congress is made expressly the depository of certain powers, absolutely essential to be brought into exercise, in the performance of the duties here enjoined.

§ 215. For instance, the power to provide for the common defence, and to draw out and control all the pecuniary resources and the physical power of the nation. Without these, this clause never could be executed; and they are in the hands of Congress alone. Without entering into any minute criticism on the word "guarantee," it may be safely stated, that the clause prescribes a republican government for all the States, protection against hostile invasion, and, on request, against domestic violence. In regard to the first, a republican government for the States, the duty of the general government to furnish it, under any circumstances, necessarily implies a duty on all the States to have such a government. Every State must have a republican government; and, if at any time a State is destitute of one, the general government is bound to provide it.

§ 216. The first requisite to the performance of the duty is to understand it, — to know what it is. The Constitution gives no definition of it, and refers to no standard; and there is no standard of adequate authority to bind the government on the subject. With such lights as the principles of moral and political law afford, the government must decide for themselves what the Constitution intends by a republican form of government. What are its fundamental requisites, its constituent ingredients, its essential characteristics, that distinguish it from any and

all other forms of government? Without some knowledge on these points, an intelligent opinion cannot be formed in regard to any government, whether it is republican or otherwise. At present, however, our government have prescribed no rule of decision; and the principles, if there are any, on which particular cases are practically decided, for the time being, are vibratory and uncertain. Still some things in regard to them would probably be universally admitted.

§ 217. It is not that the sovereignty, the ultimate right and power to control in the last resort, resides in the people; for this is equally true of all governments. It is not that the government was originally established or ordained by the voluntary agency of the people; for a republic may grow up on precedent, or be founded by the decree of a despot, as well as any other government. It is not that a portion of the regular administrative authority remains with the people, to be exercised by suffrage, the only way in which they ever can exercise sovereignty; because the same may be done in all other governments. Every despot in Europe has his Parliament. Nor is it that in such cases a large proportion, or even the whole, of the people participate in the suffrage; for a despot is not unlikely, on occasions, to desire, and even demand, universal suffrage. Neither the frequency with which the suffrage may be exercised, the importance of the particular subjects on which

it is called for, nor the proportion of the whole people who may participate in it, nor even the weight of consideration which may be allowed to it, will determine the character of the government. Napoleon might call for the suffrages of all France, every month in the year, in regard to every important measure by which he controls Europe, and conform to the result, and yet keep his government as far removed from republicanism as it is at present.

§ 218. A monarch may respect public opinion, and govern for the public good. So may the nobles, or the few. But the principle of a monocracy is *mon droit*. That of an aristocracy or oligarchy is the same, only in a diluted form. The principle of republicanism is the equal right of the people, the citizens, all the members of the body politic. In theory it is the government of public opinion; the public being its own members and subjects, and the opinion being their own intelligent and well-considered judgment in regard to the requirements of their own best good and permanent interest. The excellence of a particular government consists in its adequacy to obtain the formation and expression of such an opinion. The essence of its republicanism consists in the fitness of its means for understanding and administering that opinion, and the practical efficiency with which it holds its agents to their responsibility for doing so.

§ 219. It is obvious that no reliance can be

placed by any government on the permanent support of such a public opinion as republicanism demands, otherwise than by a strict adherence to the laws of God and eternal justice, the equal and inalienable rights of man. Hence republicanism is founded on those principles; and fidelity to them is essential to the security of its own existence. Election and representation are the means by which the people primarily initiate and direct measures; and the vicarious character, and consequent responsibleness, of the government are the means through which the people obtain the anticipation and enforcement of their future claims. The fundamental principles of right and justice for the government, the representative character of the governors, and their practical responsibleness to the governed, are the essentials of republicanism: the details may be variously arranged.

§ 220. The best model of such a republican government is the Constitution of the United States.[1] But if it was not in all respects absolutely the best, still it would be the most authoritative one for all the subordinate governments of the country; because it is the form actually adopted by all the people for their own supreme

[1] "The Constitution is strictly republican; for all its powers are derived, directly or indirectly, from the people, and are administered by functionaries holding their offices during pleasure, or for a limited period, or during good behavior." — 1 Story's Com., 269; Federalist, No. 39.

"The foundation of . . . liberty, and of all free government, is a right in the people to participate in their legislative council." — Declaration of Rights, 1st Congress, Oct. 14, 1774.

government. The Constitution of the United States presupposes the existence of a well-informed public opinion, for it is predicated upon it, and ordained by it: "We, the people, establish" it. The people forcibly cast off their old government, asserted their independent rights, and established a new one.

§ 221. But if it had been given by the king's charter, and the independence voluntarily granted, it would have been none the less republican. Its character depends upon its fundamental principles, and the manner in which they are practically sustained and administered, rather than on the manner in which it was formed. The mode in which our Constitution endeavors to forestall a conformity to public opinion, in all the acts and actors of the government, is by laying the foundation of them all directly in popular election. "The House of Representatives shall be composed of members . . . chosen by the people." This is the first and principal branch of the supreme legislature; and no step can be taken in creating or sustaining any other or further act or agency in the government, without their acquiescence and assistance.

§ 222. Thus the whole superstructure is built on the suffrages of the people. The people are the citizens, the members of the body politic, and all the members. Not that every member must necessarily vote, or even have personally, under all circumstances, a right to vote. Public

opinion can be collected at a cheaper rate. The Constitution implies that the electors may be a different body, though it must be composed entirely from the mass of citizens, and no others. Still they must be competent to think, speak, and act for the whole, and in the name of the whole, — not merely by the arbitrary appointment of civil society, but by the permanent laws of nature, and the unchangeable edicts of the divine constitution. These may be known and read of all men. The public law of all lands arrogates to the adult males the competency to represent the physical, intellectual, and financial power of the nation; and, in the absence of all experimental proof to the contrary, it may be safely presumed, that neither the addition nor substitution of women or children or both would beneficially or even materially affect the result. But the list may not be rightfully diminished but for cause, — and such a cause as might justly show an unfitness for the duty, and so operate a deprivation of the right, as well in respect to this as any other right involving a corresponding duty. Public opinion, thus constitutionally manifested, forms the corner-stone and the superstructure of our government.

§ 223. It is not presumed that Representatives so chosen will sanction measures leading to the appointment of other agencies that will disregard the rule by which all must be ultimately controlled. But if this should fail, and the gov-

ernment should stray beyond the line which public opinion will sanction, the periodical recurrence of the election will call them back, and enforce what is considered, in most cases, an adequate responsibility, by passing judgment on their acts. The theory is, that public opinion substantially directs the course of the machine, by choosing the original officers, and then periodically holds them to account for their acts, by passing judgment on the results of their operations.

§ 224. For this purpose, it is not necessary that the same officers should be candidates for re-election. It is sufficient to enable the people to approve or to condemn a particular measure, or the general course of measures, that the succession is to be provided for from the associates and supporters of the incumbent, or elsewhere. In this manner, adequate provision is supposed to be made for the constant supervision and efficient responsibility of the government, and for the expression and enforcement of a deliberate and intelligent public opinion. The principles of this model are substantially enjoined on the States, by requiring of them a republican form of government, and especially by laying the foundation of their governments in the same popular election.

§ 225. The qualifications of the electors of Representatives to Congress and of the most numerous branch of the State legislatures must

be the same; and as those of electors for members of Congress are absolutely fixed by the Constitution, so far as respects citizenship, they are fixed also in this respect for the States. The States, then, must have legislatures in two branches; and the members of the most numerous branch, like the members of the House of Representatives of the United States, must be chosen by the people. If they must be chosen by the people, then the people, the citizens, and they only, have a right to choose them. All rights, even life and liberty, may be forfeited; but the forfeiture must be demanded and taken by due process of law, and not by arbitrary edict.

§ 226. Many other particular provisions are emphatically, though indirectly, required by the Constitution, for the State governments, by being made absolutely necessary to enable them to perform their appropriate and required duties as States in the Union, and portions of the United States. The States must not only have governments, and republican governments, and constitutions,[1] which must necessarily be written constitutions; but their governments must, like that of the United States, be divided into three departments, legislative, executive, and judicial; for the Constitution assigns appropriate duties to each of these departments, requiring their existence and separate organization. The legislative department must also have a plurality of branches;

[1] Article VI.

for the Constitution describes one as the most numerous branch,[1] obviously in allusion to its own division into the two Houses of Representatives and Senators.

§ 227. It would seem that the executive must be single;[2] for otherwise there might be, in case of domestic violence, the same difficulty in convening them, as the Constitution intends to provide against in regard to the legislature. The Constitution provides that the State Judges shall be bound by the Constitution and laws of the United States, and for the faith and credit of their judicial proceedings. There can be no hesitancy in admitting, that a government, founded and faithfully administered on these principles and by such agencies, is a republican government within the meaning of our Constitution.

§ 228. The duty to protect each State against invasion is an instance of the many pleonasms and reduplications of the Constitution. Every State, Territory, and District, being a part of the United States, has its safety abundantly provided for by the more general and important duty elsewhere enjoined, "to provide for the common defence." The remaining duty of this section, to protect each State against domestic violence, is apparently postponed for an application from the State itself for assistance. But it may well be doubted if any dereliction of duty on the part of the officers of the State, whether legis-

[1] Article I. [2] Article IV.

lative or executive, would afford an adequate excuse for the general government, in suffering the regular administration of the authorized republican government of a State to be overthrown and destroyed, or otherwise substantially interfered with, by domestic violence, under circumstances that obviously required their authoritative interposition for the preservation of the peace and good order of the community.

§ 229. The sixth Article of the Constitution contains three divisions or sections, neither of which expressly requires or authorizes any action of Congress, and yet neither of them ever has been or can be executed and enforced without legislation, which Congress, and Congress only, can furnish; and which they have furnished, to such an extent as to show that any deficiency in this respect arises from some other cause than a want of power under the Constitution. The first is, "All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." The prominent idea of this section is the succession of the new government to all the duties and obligations of the prior governments of the nation. The right of succession to all their rights of property had already been provided for in the 3d section of Article IV. The result would have been the same, however, if both had been omitted.

§ 230. By international and universal law, a change of dynasty works no alteration in the rights or duties of a State. Its laws and institutions also remain the same, except in so far as they may be directly affected by the change in question. The clause was intended to provide especially for the *debts* of the Revolutionary and Confederation governments. These have been, long since, fully paid and discharged; and it has so far become *functus officio*. In regard to *engagements*, it undoubtedly included all existing treaties with foreign nations, and is supposed to have particularly intended the obligations assumed by the ordinance of 1787. These were substantially re-enacted by the Act of 1789.

§ 231. No such re-enactment was necessary, if the ordinance was originally valid. But a doubt on this subject occasioned these proceedings by way of confirmation. Otherwise the ordinance was as much a part of the law of the land, after the adoption of the Constitution, as it was before. Few general laws had ever been passed by either of the prior governments, except what subserved the immediate purposes of the War of the Revolution, and had ceased with it. But one prominent Act of the Revolutionary Congress, the Declaration of Independence, remained in force, and was handed over for administration to the Confederation.

§ 232. It never has been repealed or become obsolete, and is to this day, as on the fourth of

July, 1776, a part of the law of the land, with the principles on which it was founded, and by which it was sustained. No dynasty has ever revoked or annulled it, or any part of it. The Constitution of the United States is so far from having repudiated or weakened it, or any of its principles, that it is built upon it as upon a corner-stone, and has made its principles the absolute foundation of the whole fabric of our government. The clause in both its parts has been carried into execution by appropriate legislation.

§ 233. The 2d section of this Article is, "This Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; any thing in the constitution or laws of any State to the contrary notwithstanding." The object and effect of this explicit declaration of the entire supremacy of the government of the United States over the whole nation, is so palpable and intelligible, as to supersede any attempt at exposition, or any endeavor to make it more plain or more certain, by any choice or arrangement of words that could be applied to it. Every part of it, however, requires almost constant legislation, though no interference of Congress is expressly authorized by any part of it. Nei-

ther the Constitution, laws, nor treaties, would have been of any avail originally, without Congress; and even now the wheels of government would speedily stop, without the frequent renewal of legislative appliances.

§ 234. Over and above everybody else, who are undoubtedly bound by the laws, State Judges in particular are said to be specially bound thereby; because they are not only to obey, but it is their official business to administer and execute, the laws of the land. Congress have never undertaken to carry this provision into execution, otherwise than by providing for a revision of their proceedings in certain cases; but he would be a bold legislator who should assert that this was the end of all the power of Congress for carrying into execution this provision of the Constitution. So the last clause of the section authorizes all Judges and all people to treat as nugatory and void any State constitutions or laws contrary to any part of the supreme law of the land. But it is not thence to be inferred, that no further laws for carrying it into execution would be necessary and proper, if the opinion of Congress should lead them to a different result.

§ 235. The 3d and last section of this Article VI., requiring all officers, State and national, to be bound by oath to support the Constitution, has been already sufficiently remarked upon. Legislation, though not authorized on its face,

was first used on this section, and has remained in full force ever since.

§ 236. "The ratification of the conventions[1] of nine States shall be sufficient for the establishment of this Constitution, between the States so ratifying the same." The Constitution was ratified by all the States; but without legislation it was a mere dead letter, and would so have remained to this day. Yet the Article on its face neither authorizes nor requires any. All the powers of legislation necessary to vivify and carry into execution the Constitution, and all the powers of the government, as well as the particular provisions of the preceding sections, already commented on, must be found, and were found, in other parts of the Constitution. If they had not been, the Constitution never could have gone into operation at all, much less could it have been successfully administered and practised upon, as it has been, for more than three quarters of a century.

[1] Article VII.

CHAPTER XVII.

LEGISLATIVE POWERS. — SPECIAL.

§ 237. In further explanation of the extent of the legislative power of the government, though not in addition to it, the Constitution mentions many subjects particularly, to which the attention of Congress is specially called, and in regard to which their action is directly invoked. It also contains some qualifications and restrictions of that power. These will next be noticed in their order; and such of them as may be thought to invite particular attention, will receive it. The first of these special powers relates to the census.[1] "The enumeration [of the people] shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct."

§ 238. This power is legislative; for it is to be executed "by law," that is, by making a law. It also relates to several of the avowed purposes

[1] Article I., section 2.

of the people in the establishment of the Constitution. It has a direct bearing upon the "perfection of the Union," by its influence on the equalization of the representation of the people. "Justice" and "tranquillity" are affected in the same way. The "common defence" and "general welfare" may be promoted by ascertaining the strength and distribution of the physical force of the nation. In executing this provision, Congress have wisely included in the census much useful information, besides the mere enumeration of the people. But, in the simple enumeration, several matters of more or less importance, not specifically provided for in the Constitution, might well be settled by law.

§ 239. The apportionment of Representatives and direct taxes is to be predicated upon it. It is therefore important to know on what principles it is made. By the Constitution, it must include all persons; for "the whole number of free persons, . . . and . . . all other persons," are all persons. Yet not absolutely; for "Indians not taxed" are expressly excluded. Who are they? All the descendants of the Indian natives, who adopt our civilization, live in the midst of our people, and subject to the duties of our laws? Those who live in the same manner, but having nothing to be taxed for, and nothing to pay taxes with, are not taxed? Or those who, living in their own tribes, separate from our people, governed by their own usages and customs,

and not participating in our civilization, or in our jurisprudence? Again, from what are they excluded? From the enumeration altogether, or only from the first class, who are counted as units?

§ 240. But there may be other exclusions. "All persons" does not really, in this place, mean everybody, without regard to any thing but their humanity and personality. They must bear some relation to the State in which they are enumerated. What is this? Must they be actually in the State at the time? Must they have a home, domicile, or permanent residence in the State, whether there or not personally? Must they be members of the State, have the franchise; or may they be foreigners, and without right? If aliens, friends or enemies? Must they be counted as units or fractions? Be *free*, — entitled to the freedom of the country, — in distinction from foreigners, in distinction from bondsmen, or in distinction from slaves? If such questions are not settled by law, they must be settled practically by the officer who takes the census in every parish, and may have as many different decisions as there are such officers.

§ 241. At this moment [1864] how many members of Congress owe their seats to the enumeration of traitorous citizens and foreign enemies; how many to aliens, every white one being a unit, and every black only three-fifths of one? If persons in the service of the gov-

ernment, in its armies or otherwise, may be counted where they are stationed when the census is taken, they might add several members to the delegations of States where they are, and detract as many more from States where they belong. This would be as unjust to the States concerned, as their absolute disfranchisement would be to themselves.

§ 242. By section 4, "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed, in each State, by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators." This involves an inquiry into the nature and extent of the power provided for, and into the disposition made of it. It authorizes Congress to do supremely whatever the State legislatures may do provisionally, on any part of the subject. Its relation to the general purposes of the Constitution, as announced in the enacting clause, are sufficiently palpable; for the government, so necessary for forming "a more perfect Union," and executing the whole Constitution, could not be organized and maintained without it. The authors of the "Federalist" say that this provision was inserted on the avowed principle, "that every government ought to contain in itself the means of its own preservation." This is obviously the true reason, and the only one, giving the largest signification to the word *pres-*

ervation. To render the provision adequate to its purpose, it is necessary that it should extend to every regulation requisite for holding and perfecting such an election. The Supreme Court have well said, that, wherever the Constitution confers a power, it includes with it whatever is necessary to render that power effectual.

§ 243. The 4th section is broad enough to include the regulation of the whole elective franchise, and the mode of its exercise. General provisions of this sort must be made effectual to dispose of the whole subject and give it its perfect effect, unless there are other provisions by the same authority making a different disposition of some parts of it. Whatever particulars are elsewhere regulated, need not and may not be otherwise disposed of, under this general authority. It will not be pretended, that, with this Article in the Constitution, an election of Senators or Representatives could legally be allowed to fail, even if there had been no other allusion to any part of the subject in the whole instrument. This provision alone would have furnished ample authority for regulating, by law, the whole subject, from the number and qualifications of the electors and the elected, to the ascertaining and commissioning the officers. Nor will it be pretended, that any matter expressly provided for by the Constitution, either by direct precept or by special reference to a subordinate power, can be altered or otherwise

regulated under the general authority of this section.

§ 244. For instance, the Constitution says that Representatives shall be chosen by "the people," and Senators by the State "legislatures," — the first for two years, and the last for six years; and that, for filling vacancies in the first, the executive "shall issue writs of election," and in the second, "shall make temporary appointments." It will not be contended, that these or any other precepts of the Constitution can be superseded or interfered with by virtue of this 4th section. The result is that all elections of Senators and Representatives shall be instituted and conducted under the authority of this section, in all respects not otherwise provided for in this Constitution. Thus the whole subject is left precisely where it would have stood if the section had been omitted. If Congress is silent, the State legislatures may do what they please that is not prohibited; and, if the State legislatures do any thing that ought not to be done, Congress may undo it. Of the importance and extent of the authority to regulate and control the exercise of the elective franchise, there was no difference of opinion in the Convention, or in the State Conventions. The only difference was where it should be placed.

§ 245. Mr. Madison said, in the Convention, on this section, "These are words of great latitude. . . . Whether the electors should vote by

ballot, or *viva voce;* should assemble at this place or that place; should be divided into districts, or all meet at one place; should all vote for all the Representatives, or all in a district vote for a number allotted to the district, — these, and many other points, . . . might materially affect the appointments."[1] Mr. Webster, in regard to the right of suffrage, lays down "two great principles of the American system: 1st, The right of suffrage shall be guarded, protected, and secured against force and against fraud. 2d, Its exercise shall be prescribed by previous law; its qualifications shall be prescribed by previous law; the time and place of its exercise shall be prescribed by previous law; the manner of its exercise, under whose supervision (always sworn officers of the law), is to be prescribed, and then the results are to be certified to the central power, by some certain rule."[2]

§ 246. To make or alter "regulations" of the "times, places, and manner of holding elections," does not authorize an abrogation of the constitutional right of a citizen, or an interference with any other regulation fixed by any part of the Constitution. It is only to do these things for carrying out what the Constitution has already prescribed, — not to determine in opposition to the constitutional right of every citizen, but to regulate so as to protect and secure the enjoyment of the right. The word *qualifica-*

[1] 3 Madison Papers, 1280. [2] 6 Webster's Works, 224.

tions, as used in the first clause of the 2d section, can refer only to the exercise of the right, and not to the right itself. Members of the House of Representatives "shall be . . . chosen by the people of the several States." People are citizens, — citizens of the United States and residents in the State. Citizenship and residence are the only *qualifications* of the right; for if the Representatives must be chosen by them, they have a constitutional right to choose them, of which they nor any of them can be rightfully deprived, otherwise than they may be deprived of other rights, — by forfeiture. The qualifications for the exercise of the right involve a compliance with all such regulations as may be necessary to secure the efficacy of the right for those who have it, and the exclusion of those who have it not. Regulation and restriction, so far as necessary or useful, may be just and proper; but disfranchisement, directly or indirectly, is illegal. Such regulations may be made and altered, under section 4; but disfranchisement, otherwise than for cause, cannot rightfully be made by any body.

§ 247. Among the "many other points" alluded to by Mr. Madison, might be mentioned, consistent with the general rights of the citizen to the elective franchise, his previous residence; payment of taxes and registration; the frequency of elections; the permanence, functions, and qualifications of the elected; the check list;

the sorting, counting, declaring, and recording the votes, and returning the result; the appointment of the officers and their authority, under whose supervision all this is to be done, together with the means of punishing frauds and securing the purity of the election. These relate only to the mode of guarding and regulating the exercise of the right. All this, and still more, is included in the time, place, and manner of an election; and such items as are not otherwise provided for fall necessarily within the purview of this general provision. Several of them are regulated in other parts of the Constitution; but such as are not, come within the authority here delegated.

§ 248. The only qualifications of electors of Representatives to Congress, according to the 2d section, are citizenship and residence, being of "the people of the several States;" and it is doubted if there can be any others, so far as the franchise is concerned. The words "requisite for electors of the most numerous branch of the State legislature," make it necessary that the qualifications of electors of State and United-States Representatives should be absolutely the same, — they must be the same citizens, and no others; or at least the electors of State Representatives can have no qualifications in addition to those of electors of members of Congress. The 2d section does not say by whom these qualifications shall be prescribed, for this had

already been done, so far as concerns the right; all else can relate only to the mode of regulating and exercising the right; and this is expressly conferred on Congress by section 4. The qualifications of the right of electors of members of Congress being thus fixed and unalterable,[1] no others can be made for State Representatives without destroying the identity. If, therefore, color or race is not made a qualification for an elector of Representatives to Congress, it cannot be made a qualification for an elector of State Representatives, whoever may regulate it.

§ 249. The 4th section, now under consideration, gives the power of ultimate control over the election of members of Congress to the national legislature. The power to regulate *ab initio*, or to alter regulations otherwise made, is in fact a power of control over the whole subject. The right of the State legislature is nothing more than they exercise on all subjects expressly delegated to the general government, when that government does not exercise the power. If Congress exercises it, the State legislature cannot. If Congress does not regulate it, the State legislation is valid in this case, as in all others where there is no prohibition. But, in both cases, the action of Congress is equally decisive. So that Congress directly regulates the qualifications of the electors of its own members, and indirectly or incidentally also the qualifications

[1] See also fourteenth Amendment.

of electors of State Representatives, under the authority of this section.

§ 250. They have, by the express provision of this section, the absolute power to regulate the election of their own members. Whether they directly regulate that of State Representatives, or leave it, as they may, to the State legislatures, — in either case, the qualifications of voters for the latter must be either exactly the same as those of the former, or at least can require nothing additional thereto. Perhaps the qualifications for electors of State Representatives, consistently with the words of the Constitution, might be less, but certainly they could not be greater, than those for members of Congress. No State can add a qualification of color or race, or any other, for the election of their own Representatives, after Congress shall have fixed the qualifications of their own electors without it. This provision for the identity of the qualifications of the electors of the national and State Representatives, has not unfrequently been represented as absolutely conferring the power of prescribing the qualifications upon the State legislatures. But it does not say so, nor necessarily imply such an intent.

§ 251. It contains nothing inconsistent with any different arrangement. Such a one might have been added to the 2d section in these words, "These qualifications shall be prescribed by Congress," in perfect compatibility with all

that precedes. It might also be inserted anywhere else. But it must be somewhere, or the government would be destitute of the means of guaranteeing the republicanism of the States, or even of preserving its own. Whosoever distributes the national sovereignty, as exercised by the suffrage, among the few or the many, has the uncontrollable power to say whether the government shall be a republic, an oligarchy, or a monarchy. Even if the 2d section could be forced into saying, absolutely, that the qualifications should be regulated by the State legislatures, it would say nothing more than is said expressly by the 4th. "The times, places, and manner of holding elections" covers the whole subject-matter, — the officers, the agents, and the thing done.

§ 252. Whatever "regulations" the State legislature may make regarding the whole subject, Congress may "alter." If a forced construction of the 2d section, making it say what it does not say, could enable it to escape this controlling power of Congress, the consequence would be, that "the means of its own preservation," which the 4th section was intended to supply to the government, would be destroyed, and the government subjected to all the hazards that section was intended to prevent; and the guarantee clause[1] be rendered entirely nugatory, by taking away from Congress the power to fulfil it.

[1] Article IV., section 4.

Where such consequences are to be encountered, the provision supposed to produce them should, in the words of the Supreme Court, "*be expressed with irresistible clearness*," and not left to doubtful inference from words that do not express it at all. Undoubtedly this power, like most others granted to Congress and not prohibited to the States, may be exercised by them, as they have been, until Congress interfere with their own.

§ 253. The application of this provision to the election of Senators is more limited. The number and qualifications of Senators, as well as the qualifications of their electors, who must be the legislative body, or at least members of that body, are fixed by the preceding section. The place of choosing Senators is excepted from the action of Congress, to prevent the members of the State legislature from being called away from their seat of government, or where they may be sitting. Congress is therefore restricted, in regard to the election of Senators, to the time and manner thereof only. These, in case of necessity, may be so regulated by Congress as to effect an election, even though a majority of either or both Houses of the State legislature should, in violation of their duty under the Constitution, refuse to make one, or even undertake to prevent it; both of which our recent experience has shown to be among the possible evils of our system.

§ 254. It is the duty of the government to execute the Constitution; and there can be no doubt of the adequacy of their power to do it, in whatever form its prevention may be attempted. "The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority. To this supreme government ample powers are confided; and, if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they were given 'in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity.'"[1]

§ 255. The words "chosen" and "choosing," as applied to the subject, seem to imply the suffrages of individual electors; and the word "legislature," to indicate the several act of each House, as in legislative action. But the usage in different States has varied from this in both respects, and Congress has never interfered to produce uniformity, either as to time or manner; and the Senate have never rejected a member on account of the mode of his appointment by the State legislature, though they have done so on

[1] Per Marshall, C. J., for the Court, in Cohens *v.* Virginia, 6 Wheat. R., 264.

account of the time of the election having been too long before the occurrence of the vacancy it was intended to supply. They have also settled, in a recent New-Jersey case, that, where the two Houses go into convention for the election of a Senator, without any statute directing the mode of election, the convention themselves cannot elect by less than a majority of the votes cast. They have now (1866), however, passed a statute on the subject, prescribing the mode of proceeding in the election of a Senator.

CHAPTER XVIII.

LEGISLATIVE POWERS. — SPECIAL.

§ 256. WHAT kind of regulations for holding elections are to be prescribed in section 4, under the name of the "times, places, and manner" thereof? The terms themselves seem naturally to imply, that they relate to the circumstances attending the election, and not to the fact of there being one, or the right of the people to participate in it. Regulations extending beyond this could only be justified by the necessity of the case, to supply omissions in the Constitution, without which the right itself could not be exercised. The mode, then, of exercising the elective franchise; the preliminary rules, limitations, and qualifications, as to the manner of asserting and using the right, — are the legitimate province of these regulations: and they can prescribe these only in accordance with what the Constitution has done, and in the particulars which it has left to be thus supplied.

§ 257. The *times*. This, standing by itself and construed alone, would include not only an

authority to prescribe the year, the month, the day, and the hour, but the frequency, — whether once a month or a year, or once in ten years, &c. But this clause is only a part of the Constitution; and, when it authorizes *times* to be prescribed *aliunde*, out of itself, it must be understood to mean in harmony and consistency with its own express provisions. By giving an authority to regulate the *times*, it does not give an authority to repeal or violate any provision of its own, or reject all times, with the election itself, and the right of the people to hold it. Of course, all that can be done under this authority is to regulate the *times* in conformity to the constitutional provisions elsewhere made. What provisions of the Constitution affect and restrain the power that would otherwise be included in this, regarding the times of holding elections? By the 2d section, Representatives shall be "chosen every second year;" and, by the 3d section, Senators shall be chosen for six years." So the authority for prescribing the "times," in the 4th section, must be restricted within these limits. The elections, under this section, could not be held either annually or triennially for Representatives, nor biennially or septennially for Senators.

§ 258. In regard to "*places*," the authority on its face is equally absolute and unconditional; though, as the Representatives must be chosen "by the people of the several States," and the person chosen must be "an inhabitant

of that State in which he shall be chosen," it is implied that the election must be within the bounds and jurisdiction of the State. It was, however, objected to this clause, when before the Conventions, that the elections for Georgia might be required to be held on the Mohawk. This is a specimen of the unreasonableness of some of the objections to the Constitution. The Senators, being chosen exclusively by the State legislatures, must of course be chosen where the legislature is. So far, the authority in regard to *places* is therefore qualified by other provisions.

§ 259. The "*manner* of holding elections," *ex vi termini*, includes every thing else, requiring to be provided for, in order to hold successfully an election for the purposes specified; and would include the "times" and "places" also, if they had not been particularly mentioned under separate heads. Whenever it is decided that an election shall be held for a particular purpose, and the matter is left there without other directions, only that the "manner of holding" it shall be prescribed by other authority, — it necessarily follows that that other authority must make all the regulations requisite for accomplishing the purposes of the election. The "manner of holding elections" is the same thing as the mode of accomplishing elections, or, in other words, of executing that part of the Constitution which requires certain officers to be designated by elections. This includes many circum-

stances not named besides *times* and *places*, which are named.

§ 260. We are now supposing that the Constitution simply required these elections to be made, and left no other directions relating to them in any way, but this 4th section. What, then, must be done to accomplish the purpose, — to execute the Constitution, and "prescribe the manner of holding the elections"? Undoubtedly, the time and place having been provided for, the next essential requisite for holding an election would be the appointment of proper officers for making the preliminary arrangements, presiding over the occasion, and authoritatively ascertaining and promulgating the result. All this is provided for in the 4th section, prescribing the manner of holding elections. If the governmental action should stop here, the effect would be to leave all the rest to the discretion of the officers, and so the constitutional requirement of the election of Senators and Representatives would be executed. The officers would summon whom they pleased, count what votes they pleased, and substantially elect whom they pleased. Thus the election would be held, and the object accomplished.

§ 261. But this extent of discretionary power would not long be satisfactory. The people would require some rule for determining the right to vote and be voted for. This, of course, if not left to be arbitrarily settled by the execu-

tive officers, must be settled by the same authority that prescribes the other requisites for holding elections. The other requisites, going to secure the purity of the election and the punishment of all delinquencies, are numerous and important, and equally included in the authority of this section; but the right of voting, and being voted for, goes to the foundation of the government, the distribution of the sovereignty of the nation, and to the republicanism of the States. In the case supposed, all these matters would have to be regulated under the authority of this section. But, in point of fact, there are other provisions of the Constitution, bearing on some parts of the subject, and so far interfering with what might otherwise necessarily have been regulated under this section. Let us for a moment examine them.

§ 262. First, In regard to the elected. Their number is fixed by other clauses: Senators absolutely to two in a State, and Representatives provisionally, according to the census, not to exceed one for every thirty thousand, though every State shall have one. They must have attained a certain age, have been citizens of the United States for a certain length of time, and be actual inhabitants of the State where chosen at the time of election. The right of Congress to require by law other qualifications has never been exercised or claimed, and the right of the States to do the same, though claimed and exercised, has

never been admitted. Second, In regard to the electors also, the 3d section settles that Senators shall be chosen by the legislature of each State;" and the 2d section, that Representatives " shall be chosen by the people [citizens] of the several States," who of course shall have a right to choose them, which cannot be abrogated or denied. They " shall have the qualifications requisite for electors of the most numerous branch of the State legislature," *i.e.*, shall be the same citizens; for they can constitutionally be no others.

§ 263. In addition to this, the government is bound to guarantee to every State in this Union a republican form of government; and, as paramount to all other duties, and essential to the performance of any of them, they are bound to protect and defend their own existence and right to perform them all. The last is rather a necessary incident to all government, than an express provision of the Constitution. These are all the provisions, in any part of the Constitution, restricting, or in any manner qualifying, the authority given in the 4th section. But these, being in the Constitution, necessarily bind all agents under the 4th section, as well as everybody else subject to the Constitution. We will now examine how far they qualify that power.

§ 264. First, Under this authority to regulate elections of Senators and Representatives, and to

prescribe the manner of them, the number of Senators cannot be changed, or the qualifications of their electors; nor the place of their election altered by Congress, if prescribed by the State legislature. But, if the State legislatures should prescribe neither time, place, nor manner, there can be little doubt that Congress would find it inconsistent with their duty to allow the election to fail on that account. If any constitutional electors can be found willing to act, Congress would be likely to find means to procure an election, whatever might be the disposition of the main body on the subject.

§ 265. Second, In regard to Representatives, the Constitution prescribes their qualifications, and that their electors must be citizens, — "the people of the several States," — and have the qualifications requisite for electors of State Representatives. But it does not prescribe the number of the Representatives, their apportionment to the States, nor the number to be voted for by any elector; and it is perfectly obvious, that without these no valid election can be held. Under the general powers of the Constitution, "to form a more perfect Union" and "promote the general welfare," Congress, being vested with "all the legislative powers" thereof, defined to be "power to make all laws necessary and proper for executing the Constitution," might regulate these subjects; but politicians of the State-rights school would say, and say truly, in

the language of Mr. Madison's and Mr. Monroe's vetoes, that they did not find a specific authority for these particular measures, except in this 4th section.

§ 266. Here they are expressly authorized to provide for "holding elections;" and "the power vested . . . carries with it . . . the right to make that power effectual," and of course to do every thing necessary to make it so. We have seen that the effect of the identity of the qualifications of State and national electors is not a grant, or a vesting of the power to prescribe them, or to decide what is requisite, in any body. If State legislatures do it, they must do so by virtue of power gained by the 4th section, or elsewhere than in the 2d section; or they may do it by sufferance, as they make bankrupt laws and do other things not prohibited to them, though they are expressly delegated to the general government, and so not reserved to the States or people. Whatever the State legislatures may do touching any part of the subject of "holding elections for Senators or Representatives," must be done by virtue of this 4th section, and, of course, under the supervision of Congress. Nor is this supervision to be evaded by the States undertaking to do any part of it by Constitution, rather than by law. If any States should "prescribe the times for holding elections for Representatives" to Congress in their constitution, instead of doing it by Act of their legislature,

it is not probable that the effect would be different from what it would be if done the other way.

§ 267. Nor would it in regard to the "places" or "manner" of holding them. Suppose a State should provide, by their Constitution, that all their elections, State and national, should be held at the "times" and "places" of holding their county courts; and that the judges, counsellers, jurors, and officers of the court, should be legal voters, and no others, — this would be doing by Constitution what they might do by law, in conformity to this section, if there were no other constitutional provision. It would "prescribe the times, places, and [in part] manner of holding elections for . . . Representatives" to Congress. It would prescribe the qualifications of electors of State Representatives, and conform the electors of national Representatives thereto; thereby disfranchising probably ninety-nine hundredths of the citizens of the State. But Congress would probably say, either that the Act was void, so far as it concerned Representatives to Congress, not being an Act of the legislature; or that, if the people undertook to legislate by themselves, instead of by their Representatives, they did it subject to the same supervision: and they would act accordingly. This supervision covers the whole subject of elections provided for in the Constitution.

§ 268. The history of the section shows this to have been the object of this clause. There is

no room for doubt, that in the original South-Carolina Plan, where it first appears, the authors intended that the new government should be as entirely dependent on the States as the Confederation then was. It provided that "each State should prescribe the time and manner of holding elections by the people for the House of Delegates," and also that "the qualifications of the electors shall be the same as those of the electors in the several States for their Representatives." The Committee of Detail, in their first draft of the Constitution, adopted both provisions with alterations. The last they made to read, "The qualifications of the electors shall be the same, from time to time, as those of the electors in the several States of the most numerous branch of their own legislatures." In this form it was objected by Mr. G. Morris, "that it makes the qualifications . . . depend on the will of the States," and was altered by him, in the revision, to read as it now stands in the Constitution.

§ 269. The other the Committee of Detail reported in this form: "The times and places and manner of holding the elections of the members of each House shall be prescribed by the legislature of each State; but their provisions concerning them may, at any time, be altered by the legislature of the United States:" which was amended in the Convention as it now stands. The question in regard to the last clause turned

upon the fitness of giving the power to the general or State government, and not upon the extent of the power. But the discussion in the Convention and elsewhere disclosed the views of both parties on that subject. The South-Carolina delegates said, that "the States could and must be relied on in such cases." Mr. Gorham said, "It would be as improper to take this power from the national legislature, as to restrain the British Parliament from regulating the circumstances of elections, leaving it to the counties."

§ 270. Mr. Madison said, "The necessity of a general government supposes that the State legislatures will sometimes fail or refuse to consult the general interest, at the expense of their local convenience or prejudice. . . . The States ought not to have the uncontrolled right of regulating the times, places, and manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. . . . The *inequality of the representation* in the legislatures of particular States would produce a like inequality in their representation in the national legislature, as it was probable that the counties having the power in the former case would secure it to themselves in the latter." Mr. King said, "If this power be not given to the national legislature, their right of judging of the returns of their own members may be frustrated. This

scheme of erecting the general government on the authority of the State Legislatures has been fatal to the" Confederation, and is a "dangerous idea."

§ 271. Mr. Hamilton, in the "Federalist," calls this section "that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members;" and says that it rests on "this plain proposition, *that every government ought to contain in itself the means of its own preservation.*" He goes far, indeed, towards admitting its insufficiency, which was perhaps politic, under the circumstances of his advocacy; but he says "that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy;" and that this clause reserves "to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety." This, together with his argument for the safety of the power, sufficiently shows his idea of its magnitude; though he afterwards says, "prescribing qualifications of property for those who may elect, or be elected, . . . forms no part of it, [because] the qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution."

§ 272. No doubt, so far as they are so defined and fixed, they are beyond legislative control.

It will be recollected, so far as respects *electors*, their qualifications are limited by the Constitution to citizenship and residence, — being "people of the State;" but, as to the *elected*, it would be difficult to prove that Congress, having the exclusive right, in each House, of final judgment on the qualifications of their own members, might not make some rule that would effect exclusions, beyond the special requirements of the Constitution. Indeed, the law directing the form and substance of their credentials, and requiring loyalty to the country, are in the nature of such qualifications, and might without doubt be extended to other requisites.

§ 273. In the Massachusetts Convention, Mr. George Cabot considered the two branches of the national Congress as mutual checks upon each other, and argued, that, "if the State legislatures [who are the constituents of the Senators] are suffered to regulate conclusively the elections of the democratic branch, they may, by such an interference, first weaken, and at last destroy, that check; they may at first diminish, and finally annihilate, that control of the general government, which the people ought always to have, through their immediate Representatives." Mr. Theophilus Parsons, afterwards the learned and celebrated Chief Justice Parsons, contended that the powers vested in Congress by this section were "not only necessary for preserving the Union, but also for securing to the people their

equal rights of election." . . . A State legislature, for personal or party purposes, in times of popular commotion, "might make an unequal and partial division of the State into districts for the election of Representatives, or *they might even disqualify one-third of the electors.* Without these powers in Congress, the people could have no remedy." The Hon. Mr. White, on the other side, said, "Suppose the Congress should say that none should be electors but those worth £50 or £100 sterling,—can they not do it? Yes," says he, "they can." So both parties considered the section as covering the whole regulation of elections, including the qualifications of electors and elected, so far as left uncontrolled by the Constitution.

§ 274. In the Virginia Convention, Patrick Henry said, "The control given to Congress over the time, place, and manner of holding elections will totally destroy the end of suffrage. . . . Congress may tell you they have a right to make the vote of one gentleman go as far as the votes of a hundred poor men. The power over the manner admits of the most dangerous latitude. . . . They may regulate the number of votes by the quantity of property, without involving any repugnancy to the Constitution."[1] Mr. Madison[2] said "it was necessary to give the general government a control over the time and manner of choosing Senators, to prevent its own dissolu-

[1] 3 Elliot's Debates, 60, 175. [2] Ibid., p. 366.

tion. With respect to the time, place, and manner of electing Representatives, . . . it was found necessary to leave the regulation of these . . . subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. . . . Elections are now regulated unequally in some States, particularly South Carolina, with respect to Charleston, which is represented by thirty members. Should the people of any State, by any means, be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." He had said on another occasion,[1] speaking of "the qualifications of electors and elected, — if the legislature could regulate those of either, it can by degrees subvert the Constitution. A republic may be converted into an aristocracy or oligarchy, as well by limiting the number capable of being elected, as the number authorized to elect. . . . Qualifications founded on artificial distinctions may be devised by the stronger, in order to keep out partisans of a weaker faction." Mr. George Mason, on the other side,[2] said "that Congress may, by this claim, take away the right of representation, or render it nugatory, despicable, or oppressive. It is at least argumentative, that what may be done will be done."

§ 275. In the North-Carolina Convention,[3] Mr. Spencer objected to this clause, that it gave

[1] 5 Elliot, 404. [2] 3 Elliot, 408. [3] 4 Elliot, 52.

Congress "an absolute control over the election of Representatives." — "They may alter the mode of election, so as to deprive the people of the right of choosing." — "It puts all but the place of electing Senators into the hands of Congress." Mr. Iredell, afterwards Mr. Justice Iredell of the Supreme Court, answered that it could not affect what was elsewhere settled by the Constitution. Senators were chosen for six years, and Representatives for two years only. But, he added, "If a State should be involved in war, and its legislature could not assemble, it might be useful; [or if] a few powerful States should combine, and make regulations concerning elections which might deprive many of the electors of a fair exercise of their rights, and thus injure the community. It seems natural and proper that every government should have in itself the means of its own preservation. A few of the great States might combine to prevent any election at all." Mr. Bloodworth said, "May not their power over the manner of election enable them to exclude from voting every description of men they please? The democratic branch is . . . much endangered."

§ 276. Governor Johnston said, "Congress can have no other power than the States had. The States, with regard to elections, must be governed by the Articles of the Constitution; so must Congress." Mr. Davie said, "If Congress had the power of making the law of elections

operate throughout the United States, no State could withdraw itself from the national councils without the consent of a majority of the members of Congress. . . . When the councils of America have this power over elections, they can, in spite of any faction in any particular State, give the people a representation. . . . Congress has ultimately no power over elections, but what is primarily given to the State legislatures. . . . When aristocracies are formed, they will arise within the individual States. It is therefore absolutely necessary that Congress should have a constitutional power to give the people at large a representation in the government, in order to break and control such dangerous combinations." In the South-Carolina Convention, General C. C. Pinckney said, "It is absolutely necessary that Congress should have this superintending power, lest, by the intrigues of a ruling faction in a State, the members of the House of Representatives should not really represent the people of the State; and lest the same faction, through partial State views, should altogether refuse to send Representatives to the general government."

§ 277. In the New-York Convention, Mr. Jay, afterwards Mr. Chief Justice Jay, said, "Suppose that, by design or accident, the States should neglect to appoint Representatives, certainly there should be some constitutional remedy." Mr. Robert Morris said, "It was absolutely

necessary that the existence of the general government should not depend, for a moment, on the will of the State legislatures." In the Pennsylvania Convention, Mr. Wilson, afterwards Mr. Justice Wilson of the Supreme Court, said, "Without this clause, it [the government] would not possess self-preserving power. . . . Some States might make no regulations at all on the subject; it is possible, also, that they may make improper regulations. The members of our [the popular] branch of the general legislature would be the tenants at will of the electors of the other branch, and the general government would lie prostrate at the mercy of the legislatures of the several States."

§ 278. There was no difference of opinion as to the extent or importance of the power, but only where it should be lodged. The State-rights party wanted it to be vested in the State legislatures, because they saw, that, if it was so, the new government would be like the Confederation, entirely dependent on the States; and the other party wanted it vested in Congress, because they wanted an independent "firm national government," adequate not only to its own self-defence and preservation, but to all "the exigencies of government, and the preservation of the Union." All the evil that one party saw Congress might do, with this supervisory power, the other party saw that the State legislatures could do without it. So the question turned,

not on the nature of the power, but on the predilection of the parties as to the character of the government to be created. While one party wished so to organize the government as to enable it to do good, the other wished so to hamper it as to prevent its doing any thing, for fear that it might do evil.

§ 279. It is perfectly apparent, from these extracts from the debates, that it was well understood by both parties, that the whole law of elections, subject to the provisions of the Constitution, was under the control of Congress. The number, selection, and qualifications of electors and elected were, so far as they were left unsettled by the Constitution, as much so as any other branches of the subject. The equal rights of the people in the elective franchise, and the just distribution of their power of choice, were held to be within the prerogative of Congress, as much as time and place of exercising them. A State legislature could no more disfranchise three-fourths, one-half, or one-fourth of the adult male citizens of the State, or admit aliens to the franchise, without a remedy in Congress, than they could prohibit an election altogether, or substitute one of their own for that of the people. The Constitution is the same to-day as it was then, notwithstanding its infringement has been so long tolerated; and it is the duty of Congress to see, that no aristocracy, oligarchy, or privileged class is allowed to usurp the rights

of the people, or disfranchise any portion, much less one-half or a majority, of their own citizens.

§ 280. This is what rendered the clause so important to the people, in order to enable their government to defend their own existence, and to secure a republican government to the States. Of what comparative consequence was it, whether the vote was taken this week or next, in the shire town or the half shire, by ballot or *viva voce?* The great question was, whether the people should have any security for being allowed to vote at all, — the regulation of the suffrage, — so that the whole people should have a free and equal election. If the matter was left to the uncontrolled management of the State legislatures, they might limit the suffrage to a particular class, a privileged order of the people; or they might say that they were the people, and take the election into their own hands; or they might prohibit the election altogether. We have have had examples of each sort. In some of the Southern States, less than half, or even a third, of the adult male citizens have been allowed to participate in the elections. In South Carolina, the legislatures have always taken the election of President and Vice-President into their own hands, and excluded the people altogether. An instance of the third kind was when eleven States withdrew their whole delegation and prohibited any new election, and insisted that it was all constitutional.

§ 281. After a four years' war, to prove the contrary, Congress are still in doubt whether they have any right to prevent the whole course from being re-enacted next year, or even from being practised under their own eyes to-day. Even now (1866), a large majority of the free adult male citizens are absolutely disfranchised in some of the States, and a quarter or a third part of them in several others, by State laws, in defiance of the Constitution. These are all loyal citizens, — loyal to the Constitution and to the government. It is true they are not disfranchised avowedly because they are loyal; but they might be, just as well as for no reason at all; and the disfranchisement extended to everybody that was so, and include every man in the State who would accept an office, civil or military, serve as a soldier or sailor in the army or navy of the United States, or take an oath of allegiance to the Constitution. Thus the government is liable to be driven out of any State, if they will not execute their own power for their own protection, and for that of the people. Not only the republicanism of the States, but the republicanism of the United States, and even the existence of the nation in any form, is left dependent on prevailing factions, in these subordinate local organizations.

§ 282. By the 4th section, also, Congress may appoint the time of their own annual sessions; and by the 6th determine the amount of

compensation for their own services, to be paid out of the treasury of the United States. When the Constitution says a thing shall be done "by law," it means it shall be done by Congress; for the whole legislative power, or power to make laws, is vested in Congress. Section 7 vests in Congress the right, by a two-thirds vote of each House, by yeas and nays entered on their respective Journals, to overrule the President's veto, or objections to the passage of any law sent to him for his approval.

CHAPTER XIX.

LEGISLATIVE POWERS. — SPECIAL.

§ 283. The 8th section, on account of its length, the variety and importance of its subjects, and still more on account of the use that has been made of it, requires particular attention. It was well observed by the "Federalist,"[1] "That it is both unwise and dangerous to deny to the Federal government an unconfined authority, in respect to all those objects which are intrusted to its management. . . . A government, the Constitution of which renders it unfit to be intrusted with all the powers which a free people *ought to delegate to any government*, would be an unsafe depository of the NATIONAL INTERESTS." Notwithstanding this, the State-rights school of politicians have constantly held, contrary to the introductory clause of the Constitution, that the objects of the government were few and narrowly limited, and that the means given for their execution were only those without which they could not be executed. Mr.

[1] No. 23.

Jefferson does not hesitate to say, "It was intended to lace them up strictly within the enumerated powers, and those without which, as means, those powers could not be carried into effect." [1]

§ 284. By *enumerated powers*,[2] he and all his followers mean those mentioned in this section; and, by "necessary and proper" means, they understand those only without which the *enumerated powers* themselves would be wholly void. This view of the Constitution has been maintained mainly by two wholly gratuitous and false assumptions. 1st, That the introductory or enacting clause is no part of the Constitution; and, 2d, That this 8th section is an enumeration of the powers of the government. They are both gratuitously assumed, because the Constitution affords no foundation for either. They are both false, because the direct assertions of the Constitution contradict them. In regard to the first,

[1] Opinion on the Bank, February, 1791.

[2] Mr. Monroe says (Message, May 4, 1822), "The powers specifically granted to Congress are what are called 'the enumerated powers,' and are numbered in the order in which they stand; among which, that contained in the first clause [taxation] holds the first place in point of importance."

Mr. Madison says (Veto Message, March 3, 1817), "The legislative powers vested in Congress are specified and enumerated in the 8th section of the first Article of the Constitution; and it does not appear, that the power proposed to be exercised by the bill is among the enumerated powers."

Mr. Jefferson says (Opinion on the Bank, Feb. 15, 1791), "The powers specially enumerated are: 1st, The power to lay taxes for the purpose of paying the debts of the United States. . . . 2d, To borrow money; 3d, To regulate commerce," &c. These are powers of Congress in the exact order in which they stand in the 8th section.

it has been sufficiently shown, that the introductory or enacting clause is in the Constitution, and a part of the supreme law of the land.[1] The second will be examined here and now.

§ 285. This section, though forming, grammatically, but a single sentence, is divided into eighteen distinct members of a sentence. As commonly printed, and doubtless by authority, though not of the Convention or of the people, these distinct members have been marked by numbers from one to eighteen inclusive, and thus become enumerated. But this numerical designation of the different members of this sentence was not in the original, and forms no part of the Constitution, but is altogether an interpolation. The only authorized numerical division of the Constitution is into Articles and sections. Upon this interpolation is founded the idea of *enumerated powers*. And upon the unauthorized rejection of the enacting clause, containing all the objects and duties of the government, the idea is founded that here are the actual powers of the government; whereas the section itself declares them to be only the special powers of Congress, or that portion of the general power of the government, which, on distribution, falls to them as one of the departments of the government. So that the common phrase, the *enumerated powers of the government*, as applied to this section, involves two manifest errors:

[1] Ante, p. 75.

1st, That these powers are actually enumerated, or called enumerated, in some part of the Constitution; and, 2d, That they are the powers of the government generally, when they are expressly specified as powers of the legislative department only, in the same manner as other powers are called the powers of the executive or judicial department.

§ 286. And they are but a portion even of these; for many more than are mentioned in this section are specified in other sections as belonging to Congress, or necessarily devolving on them as the legislative department. Yet this unauthorized enumeration of a part only of the specific powers of one department, has been represented and treated as an exact specification of all the powers of the government, been called the *enumerated powers*, and made to officiate, when occasion required, as an absolute limitation of their rights and duties. Indeed, the single fact, that the Constitution confers some powers in particular, has been made use of as an argument to prove that it could confer no powers in general, covering those particulars.

§ 287. Mr. Jefferson says,[1] "To consider the . . . phrase [to provide for the general welfare] . . . as giving a distinct and independent power, . . . would render all the . . . enumerations of power completely useless. It would reduce the whole instrument to a single phrase,

[1] Ubi sup.

— that of instituting a Congress [or government] with power to do whatever would be for the good of the United States." *Ergo*, the argument is, the Constitution contains no such power. Mr. Madison says,[1] "The terms 'the common defence and general welfare,' embracing every object and act within the purview of a legislative trust," would render "the special and careful enumeration of powers . . . nugatory and improper." The whole school of State-rights politicians, including Monroe, Calhoun, and Jefferson Davis, have reasoned in the same way.

§ 288. That such an argument should have been used and pressed by the authors of the Kentucky and Virginia Resolutions of 1798 and 1799, and maintained by their followers, is no matter of wonder. It was necessary for their purposes; and it was therefore, in their view, politic and expedient to sustain it. But the idea has unfortunately higher authority than either or all of them. Alexander Hamilton, in the 83d number of the "Federalist," says, "The plan of the Convention declares, that the power of Congress, or in other words of the *national legislature*, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative

[1] Veto Message, March 3, 1817. — He says, in his speech on the Codfishery Bill, in February, 1792, "This is not an indefinite government, deriving its powers from the general terms prefixed to the specified powers; but a limited government, tied down to the specified powers, which explain and define the general terms."

authority; because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended."[1]

§ 289. This evidently refers to the different parts of the first Article, where "all the legislative powers" of the government, and subsequently certain specific powers, are vested in Congress. It was not used by him in the way of argument against the general legislative powers of the government, arising from the fact that particular powers are also delegated; for that subject was not then under discussion. He was arguing against an improper use, made by his opponents, of the maxim, "that a specification of particulars is an exclusion of generals;" and, after proving their error, he proceeds as above, in order to illustrate incidentally his own idea of what would be a proper use of that maxim. It should be remembered, too, that he was anxiously

[1] And yet he says, in his Report on Manufactures, Dec. 5, 1791, "The objects to which it [the revenue] may be appropriated are no less comprehensive than the payment of the public debts, and the providing for the common defence and general welfare. . . . The phrase is as comprehensive as any that could have been used; because it was not fit that the constitutional authority of the Union, to appropriate its revenues, should have been restricted within narrower limits than the general welfare; and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor definition. . . . A power to appropriate money with this latitude . . . is granted, too, in express terms."

If a specification of particulars excludes generals, then the Constitution, by granting the power to punish in one class of cases only, has prohibited Congress from punishing in any other cases. — Per Mr. Justice Johnson, Opinion of the Court in Anderson *v.* Dunn, 6 Wheat., 204. "The idea that the express grant in one class of cases repelled the assumption of the punishing power in any other, never occurred to any one." — *Ibid.*

laboring to convince the people, against all their prejudices, that Congress had not too much power. But, after all, the marvel is, that such a sentiment could have escaped from his pen, at any time, under any circumstances, and for any purpose; since he himself thereby committed a greater error than that of which he had just convicted his opponents.

§ 290. At the moment it was written, there was not a Constitution in the land that was not formed in just that way: vesting, first, the general legislative power in the appropriate department; and then, in subsequent Articles, specifying particular things as within their authority. Even Mr. Madison says, "Nothing is more natural or common than first to use a general phrase, and then to explain or qualify it by a recital of particulars."[1] Not that the particulars cover the whole of the generals, or add any thing to them. They only assist in expounding them, by affording specimens of such as disclose the nature and character of those of which the generals are composed.

§ 291. By the constitution of New Hampshire, "The supreme legislative power . . . shall be vested" in the General Court, to whom "full power and authority are hereby given and granted . . . to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances," in the broadest possible

[1] Federalist, No. 41.

terms, "as they may judge for the benefit and welfare of the State." Notwithstanding this plenary grant of general legislative authority, the same constitution specifies in particular many items, which are all included in the general grant, and would have been equally available if not individually mentioned at all. For instance, "to erect and constitute judicatories, and courts of record or other courts; . . . to provide . . . for . . . all civil and military officers," and set forth their powers and duties, oaths, &c.; "to impose fines, mulcts, imprisonments, and other punishments;" "to impose and levy . . . assessments, rates, and taxes," &c., &c.; specifying, in particulars almost without number, items of power and duty of the legislative department, all of which were before included in their general legislative authority.

§ 292. The constitution of Massachusetts conferred the power of general legislation in nearly the same broad and unqualified terms, and is equally filled with special provisions, conferring specific powers on that department. We might go through the whole list of State constitutions with a similar result, including the Confederation, by which the Union was then nominally held together. But the most striking example, in reference to the application of the maxim in question, is his (Mr. Hamilton's) own draft of a Constitution for the United States, presented to the Convention in his speech

of June 18, 1787. It is there provided, that "the legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defence and safety, and to the general welfare of the Union." Special power, however, is elsewhere given to the legislature to "provide for the . . . elections of Representatives, apportioning them in each State," and for the "elections of Senators;" "to provide, by permanent laws, such regulations as may be necessary for the more orderly election of President;" to "admit new States into the Union;" and to do divers other things therein specially named.

§ 293. If the test should be applied to every Constitution made since that time, the result would be the same. The constitution of every State in the Union, in force to-day, would present the same phase. The maxim in question is supposed to have been founded on the famous saying of Lord Bacon, that "exception strengthens the force of law, in cases not excepted; and enumeration weakens it, in cases not enumerated." But, whatever may be considered its origin, it can have no applicability to this part of the Constitution of the United States. The 1st section vests "all the legislative powers" of the Constitution in Congress, and subsequent sections vest particular powers in the same body. These grants of power may be repetitions, reduplications, or pleonasms, with respect to each

other; but no one or more of them, however comprehensive or restrictive, can supersede or abrogate any other. It would be as sensible to contend that the commercial power superseded the money and currency powers, or the war power the army and navy power, as it would be to insist that the power "to constitute tribunals" abrogated the power "to establish justice," and the power "to declare war" the power of "common defence." And either of them would be as sensible as it would be to say, that the special powers supersede the duty of providing for the safety, welfare, and liberty of the people; or that the safety, welfare, and liberty of the people, are only to be sought and secured through the particular regulations specifically authorized and prescribed.

§ 294. It is difficult to consider a suggestion of the idea, that special grants of power to Congress were intended as a full specification of the particulars of the rights and duties of the government under a Constitution avowedly ordained "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty,"—as strictly compatible with honesty of purpose in reasoning. They do not purport to be a specification for any purpose, or the particulars of any *whole*. They are not embodied or aggregated for any purpose, but scattered throughout the

whole instrument. The 8th section cannot be such specification, because it contains but a fraction of the particulars themselves. It requires all the parts to constitute a *whole;* and, if any smaller number of parts are expected to limit, restrict, or in any respect change the form of that *whole*, a special authority must be shown for that purpose.

§ 295. But what renders it absolutely impossible that any or all the special powers should have been intended to limit the general powers, is that the special powers themselves expressly reiterate and confer all the general powers. The 8th section authorizes Congress "to pay the debts, and provide for the common defence and general welfare, of the United States," which is an abridgment or epitome of all the avowed purposes of the Constitution, and of all the legitimate purposes of any free government. The last clause of the section is, if possible, still more explicit, expressly giving Congress power "to make all laws . . . necessary and proper for carrying into execution the . . . powers vested . . . in the government of the United States, or in any department or officer thereof." The general legislative power is here renewed and again vested in Congress, in as broad and comprehensive terms as it was originally granted in the 1st section, under the name of "all legislative powers" of the Constitution. So that there can be no ground for an argument, that, in this place,

a specification of particulars is an exclusion of generals.

§ 296. All the express restrictions on the powers of Congress go far to prove the existence of the power restricted; for who will charge the framers of our Constitution, or the American people, with the absurdity of restricting a non-existing power?[1] These restricted powers will be usually found among the more general and undefined legislative powers of the government. The particulars under this head are numerous and satisfactory. We will cite a few of them.

§ 297. By the 4th section, Congress shall meet annually "on the first Monday in December, unless they shall by law appoint a different day." This implies that Congress have the power to appoint any day they please for their annual sessions; and they have practised accordingly. Where is the power delegated? Certainly there is no special and particular provision in the Constitution to this effect. By section 9, "The migration or importation of persons . . . shall not be prohibited by Congress" for twenty years; which implies that both may be done afterwards: and they have been done. By what right? If it be said by the commercial power, it may be

[1] "It would be absurd . . . to except from a granted power that which was not granted, or that which the words did not comprehend." —2 Story's Com., 508.

"It is a rule of construction, that exceptions from a power mark its extent." — Per Cur., in Gibbons *v.* Ogden, 9 Wheat. R., 191.

added, that the commercial power itself is but a fraction of the general power which regulates the foreign intercourse of the people, in order to provide for the "defence and welfare" of the United States. The writ of *habeas corpus* was a common-law right, everywhere respected in the United States before and at the time of the adoption of the Constitution, for the protection of personal liberty. By this 9th section, it is in effect made perpetual, with the liberty it protects, for, if the right "shall not be suspended" or temporarily abrogated, *a fortiori* it shall not be repealed or permanently abrogated. This restriction is certainly applicable to Congress as well as the executive, and every body else having any control over the subject. But what special power is given to Congress over the *habeas corpus*, other than what is included in the general legislative power of the government?

§ 298. "No bill of attainder, or *ex post facto* law, shall be passed." According to the best authorities, these are not rightfully within the category of legislative powers at all.[1] But the British Parliament had often passed such statutes before our Revolution, and many of our Revolutionary legislatures afterwards; so it was

[1] "A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man judge in his own cause; or a law that takes property from A, and gives it to B, — is contrary to the great first principles of the social compact, and cannot be considered as a rightful exercise of legislative authority." — Calder *v.* Bull, 3 Dall. Rep., 386, per Chase, J.

adjudged wise, *ex abundanti cautela*, to insert this express restriction, lest a similar power should be wrongfully claimed, not by any specific grant certainly, but under the general authority of the Constitution. But the wisdom and expediency of even this restriction, unnecessary though it may be held to have been, carries with it a broad and irrefragable implication in favor of the validity of any other statute, coming within the rightful purview of legitimate legislation, and free from any such restriction.

§ 299. "No money shall be drawn from the treasury, but in consequence of appropriations made by law." Congress then, who, by being made the legislative department of the government, make the law, may appropriate the money in the treasury to any object they please, within the range of the general purposes of the Constitution. "No title of nobility shall be granted," and no religious test required, &c. How could it have been, independent of this prohibition? No special grant confers such a power on any department of the government. Other prohibitions in the 9th section, as in regard to capitation taxes, duties on exports, appropriations of money, &c., are restrictions on express powers specially delegated.

§ 300. The first Amendment is even more explicitly to our purpose than any of the above. It relates to the establishment and free exercise

of religion, freedom of speech and of the press, peaceable assemblies of the people, and the right to petition the government. Which of the enumerated powers, as they have been insidiously called, or what other specific power mentioned in any part of the Constitution, authorizes Congress to touch any one of these subjects, for any purpose whatever? Why, then, restrict the power? So of "the right to keep and bear arms," and divers other valuable common-law rights. Obviously they are all carefully guarded; because, under the general powers of the government to provide for the common defence, the general welfare, and the blessings of liberty, and to do any thing necessary and proper for those purposes, nothing could be said to be beyond the legitimate claims of an agent charged with these duties.

§ 301. Mr. Madison said, in the speech above quoted, "If Congress can employ money indefinitely to the general welfare, and are the sole and supreme judges of the general welfare, they may take the care of religion into their own hands. They may appoint teachers in every State, county, and parish, and pay them out of their public treasury; they may take into their own hands the education of children, establishing in like manner schools throughout the Union; they may assume the provision for the poor; they may undertake the regulation of all roads other than post-roads; in short, every thing, from the

highest object of State legislation, down to the most minute object of police, would be thrown under the power of Congress; for every object I have mentioned would admit the application of money, and might be called, if Congress pleased, provisions for the general welfare." As Congress have, by express grant, unlimited power to levy and borrow money, and appropriate it to "the common defence and general welfare," what could be more natural or proper than the restrictions, in these Amendments, of this great power, if the people desired so to restrict it? But if, as Mr. Madison attempts to argue, in the face of the express words of the instrument, the Constitution delegates no such power, what could be more absurd, and even ridiculous, than to enact restrictions?

§ 302. Thus the plenary powers of general legislation for the public welfare, as embraced in the enacting clause, for the great purposes of government, are vested in Congress, and are limited only by the laws of God, the principles of free government, and the express or implied restrictions of the Constitution. These two false and groundless assumptions — to wit, that the first paragraph is no part of the Constitution or supreme law; and that the 8th section is an actual specification, by way of eminence, the enumerated powers of the government — form the whole foundation, and only apology for that stupendous perversion of the Constitution known

as the State-rights doctrine, which has upheld slavery and culminated in rebellion, both equally opposed to the whole letter and spirit of the Constitution.

CHAPTER XX.

LEGISLATIVE POWERS. — SPECIAL.

The Financial Powers.

§ 303. The 8th section begins, "The Congress shall have power," &c. This vests certain powers, afterwards named, in Congress, which had already been designated as the depositary of "all the legislative powers" of the government. It does not purport to be a catalogue, a specification, or even an epitome, of those powers, and least of all an enumeration of them. It simply grants certain powers, therein named, to Congress; as other sections preceding and following it have granted other powers to them, more in number, and some of them of much greater importance, than some of these. Here is not only no disparagement of others not herein named, vested in the government generally, or in Congress particularly; but there is at the end an express mention made of "all other powers vested by this Constitution in the government . . . or any department . . . thereof," showing with certainty that there are "other powers" vested in the

government and in Congress: for all the powers of the government are to be executed through the departments, and the appropriate portion of them inures directly to Congress. So it is absolutely impossible that this 8th section should be either an enumeration or a specification of the powers of either, because it expressly recognizes others of both kinds.

§ 304. The first item is in three parts: 1st, "To lay and collect taxes, duties, imposts, and excises;" 2d, "To pay the debts, and provide for the common defence and general welfare, of the United States;" 3d, "But all duties, imposts, and excises shall be uniform throughout the United States." The second item is, "To borrow money on the credit of the United States." These two items constitute the principal sources of the revenue, or the pecuniary means of sustaining the government and accomplishing the objects for which it was ordained and established.[1] They are substantially unlimited. The power of borrowing is wholly so. They may borrow at any time, in any manner, anywhere, of anybody, to any amount, and on any terms, as to security, payment, or interest. They may levy and collect taxes, duties, imposts, and ex-

[1] Revenue lies at the foundation, and constitutes a most important part, of all the powers of the government. Without it they could not provide for the common defence, promote the general welfare, secure the blessings of liberty, or even continue their own existence. The money power might well have been considered under this head; but we have chosen to place it rather under the next, or commercial power.

cises, to any amount, at any time, on persons, property, or estate, for any purpose which the government is authorized to promote, and in any manner; with only the three qualifications of uniformity, apportionment, and exemption, which will be considered under the next section.

§ 305. Attempts have been made to limit the power to the single purpose of raising revenue; but they have uniformly failed. The first statute on the subject expressly recognized in its preamble the encouragement of manufactures as one of the objects in view; and subsequent Acts have been adjusted to the interests of commercial, agricultural, and manufacturing industry, as well as to revenue. When money is collected and received into the treasury, it can only be drawn out "in consequence of appropriations made by law;"[1] and Congress can pass no law on this or any other subject, but such as is calculated to accomplish some of the avowed purposes for which the Constitution was made. So that all appropriations must be made "for carrying into execution the powers vested in the government." The design or object of a tax may be to foster and protect the subject on which it is levied, or to limit and destroy it or any of its adjuncts. "The power to tax involves the power to destroy."[2]

§ 306. This power of taxation, including all the forms of levying, the selection of subjects,

[1] Section 9. [2] Per Marshall, C. J., 4 Wheat. R., 431.

the amount of assessment, and the mode of collection, with its universality and supremacy, must be a very formidable instrument in the hands of the government, for regulating and controlling all the subordinate agencies in the State. Mr. George Mason warned the Virginians, before the Constitution was adopted, that "this power, being unconfined and without any kind of control, must carry every thing before it," and was "calculated to annihilate totally the State governments." The United States, however, have never made use of their unlimited and uncontrollable power in this respect, to control or embarrass the operations of the State governments, even when those operations were unconstitutional, and intended directly to counteract their own proceedings. But some of the States have instructed them by examples, which might be followed as precedents, of the manner in which it might be rendered very efficient. Witness the attempts to drive the United-States Bank and the United-States Loan beyond their respective jurisdictions.[1]

§ 307. The words of the second and third lines of the section, "to pay the debts, and provide for the common defence and general welfare, of the United States," demand more special attention. The principle avocation of the State-rights

[1] See McCulloch *v.* Maryland, 4 Wheat. R.; Osborn, &c., *v.* The Bank of the United States, 9 Wheat; Weston, &c., *v.* City Council of Charleston, 2 Peter's Rep.

politicians has always been to construe away the provisions of the Constitution; and they have not been more sorely oppressed by any of them than by this. Consequently, their labors have been most abundantly bestowed here. The discussions that have arisen out of this disposition of the party have usually been of the character which military men would call a war of posts. The Constitution, at its origin, found the State governments, whether by right or by wrong, in the actual possession of the principal part of the field, and very little disposed to give up any portion of it.[1]

§ 308. Scarcely any important law for national purposes, before the rebellion of 1860, was passed without encountering objections grounded on the assumed deficiency of power in the government. The discussions have generally been so managed as to make the result settle, as little as possible, in favor of the powers of the Constitution. The slaveholding interest, always in favor of State sovereignty, under the name of State rights, gave the tone to the government, and usually controlled its action. Under these circumstances, a willing ear was always lent to any plans for limiting or curtailing the power of the

[1] The people had been informed by the Convention, in their Address to Congress, that it was impracticable to secure an "independent sovereignty to each [of the States], and yet provide for the safety of all;" and that it was "difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved." But the State legislatures, as such, had not been asked to ratify the Constitution, and had not done it.

general government, or to any objections or obstructions likely to prevent or embarrass the development or aggrandizement of their authority. It was an up-hill job to sustain the right of the nation to do any thing. The supporters of the government, therefore, in all such contests, found it expedient to expose as little front as possible, and plant their engines of defence just so as to cover the point of immediate attack.

§ 309. The first statute made under the Constitution, respecting certain oaths, was defended solely on the ground, that the legislation was necessary for executing a particular provision of the Constitution,[1] notwithstanding the legislative power was not specially invoked. The national Bank was sustained mainly on the narrow ground of the fitness and convenience of its agency in collecting and disbursing the finances. But Mr. Lawrence, of New York, said, in debate, in the House of Representatives, February, 1791, "The *principles* of the government, and the *ends* of the Constitution, were expressed in its preamble: it is established for the common defence and general welfare. The body of that instrument contained *provisions* the best adapted to the intention of those *principles*, and the attainment of those *ends*. To these *ends*, *principles*, and *provisions*, Congress was to have a constant eye; and then, by the sweeping clause, they were

[1] Article VI., section 3.

vested with the powers to carry the *ends* into execution."

§ 310. In the debate in the House of Representatives, on the 3d of February, 1866, on the Freedman's Bureau Bill, Mr. Hubbard, of Connecticut, said "There was authority in the Constitution for the passage of this Bill; for to Congress was given power to pass all proper laws to carry out the provisions of the Constitution, which include the public welfare." But though the government have always done, and continue to do, many things which could not be justified on the narrow ground of any special provision among the duties of Congress, this broad, constitutional platform has never been boldly assumed and consistently maintained by any department of the government, on any subject. There probably has not been any time when it could have been done, till now. The windy warfare of posts resulted in open rebellion, and that has resulted in the plenary establishment of the national supremacy; and the Constitution, in its original purity, may now be safely followed and successfully defended.[1]

§ 311. The words now to be considered are a part of those special provisions relating to the powers of Congress, adapted to the attainment of the avowed objects and ends of the Constitution. The different opinions that have been advanced, as to their force and effect, may be classed under four heads: 1st, Whether they

[1] See motto on the titlepage.

really mean any thing, — that is, whether they confer any power on Congress, for any purpose; 2d, Whether they confer a power to appropriate the funds arising from taxation to the objects named; 3d, Whether they are used only as a qualification of the taxing power of Congress, limiting the purposes for which taxes may be laid; 4th, Whether they specially confer on Congress the power to "pay the debts, and provide for the common defence and general welfare."

§ 312. On the first head, viz., whether they confer any power for any purpose, Mr. Madison, in his "Report of the Virginia Resolutions," states the doctrine thus: "Congress is authorized to provide money for the common defence and general welfare. . . . Subjoined to this authority is an enumeration of the cases to which their powers shall extend. Money cannot be applied to the general welfare, otherwise than by an application of it to some particular measure conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises, whether that particular measure be within the enumerated powers vested in Congress. If it be, the money requisite for it may be applied to it. If it be not, no such application can be made." The same views are often reiterated in his veto messages and other writings.

§ 313. The effect of them is, that the words

in question, "to pay the debts, and provide for the common defence and general welfare," have no meaning at all. They give Congress no power to do any thing, and are of no use, and of course ought not to be in the Constitution. The "subjoined . . . enumeration of the cases to which their powers shall extend" are the real and only "specified powers," — the actual "enumerated powers" of the government, for which alone money can be raised and used, — notwithstanding all that he and others have said about the 8th section being such an enumeration. Whenever money "is to be applied to a particular measure, a question arises," not whether it be "to pay the debts, or provide for the common defence or general welfare;" but "whether the particular measure [for either of the cases] be within the [8th section? No; but whether it be within the 'subjoined'] enumerated powers vested in Congress."

§ 314. Let the principle be explained and tested, by applying it to practice. Suppose the "particular measure" to be a bill to pay $100,000 to the captors of J. D. The question of constitutionality is raised, as usual, on all bills. The question is not, whether it is a debt which the government is bound to pay; but whether there is, within the last sixteen items of the 8th section, a specific authority granted to Congress to pass this "particular measure," paying $100,000 for the capture of J. D. Or suppose the "particu-

lar measure" to be a bill for sustaining the West-Point Academy. The question is not, whether it is properly adapted "to provide for the common defence;" but whether there is, in the last sixteen items of the 8th section, any specific authority granted to Congress to defray the expense of sending J. D., R. E. L., J. E. J., and other rebels, to school, and teaching them mathematics and military tactics. Or, again, suppose the "particular measure" to be the relief of the French refugees from the St. Domingo massacre. The question is not, whether it would redound to the credit and "general welfare" of the United States to feed these starving Frenchmen; but whether there is any specific grant of power to Congress to adopt this "particular measure," and purchase hog and hominy to give away to absconding aliens.

§ 315. To the same purport, Mr. Monroe, in his veto of the Cumberland Road Bill, says, "If we examine the specific grants of power, we do not find it among them; nor is it incidental to any power which has been specifically granted." In his exposition, afterwards, he states the doctrine thus: "The national government . . . has no right to expend money, except in the performance of acts authorized by the *other* specific grants, according to a strict construction of their powers; that this grant, in neither of its branches, gives to Congress discretionary powers of any kind; but it is a mere instrument in its

hands, to carry into effect the powers contained in the *other* grants." It is curious to observe in all this how studiously — I had almost written *insidiously* — these gentlemen assume, and take it for granted, in a solemn argument as to the extent of the powers of a great national government for half a continent, that all its powers must necessarily be specific and particular or incidental; that is, circumstantial, less than particular, more minute.

§ 316. Mr. Madison demands an authority for the "particular measure" in question. Mr. Monroe cannot find the "specific grant of power." According to these gentlemen, the specified and enumerated powers are but the eighteen items of the 8th section; and they here throw away a part of these, on the ground that they are general, and not particular or specific. Mr. Madison says no "particular measure" can be adopted under the authority to "provide for the common defence and general welfare;" but we must look to the "subjoined . . . enumeration" for the power to pass the "particular measure." Mr. Monroe says this grant is of no validity, unless the performance of the particular acts in question are "authorized by the *other* specific grants." Here, then, the narrow ground of special, particular, and enumerated powers, "according to a strict construction," is rendered still narrower by casting away a part of the specified and enumerated powers themselves. By what authority is

this done? Have not the people of the United States a right to delegate what powers they please, general or special, to their own government? and who has a right to say that a part of them mean nothing?

§ 317. In the first sentence of the Constitution, the people say they organize and establish the government for the purpose, "in order," to do certain things. This is general, it is said, and goes for nothing, because no special or particular powers are given to any body in particular to carry them out. Very well, say the people, we will have proper departments and officers to administer the government, and perform its duties. So, in the next sentence, they say, "All legislative powers herein granted shall be vested in a Congress." As all the duties of the government require legislation, the assignment of legislative power would seem to provide for that portion of the governmental duties. But no, say the objectors, this confers no *special* power on Congress. The purposes mentioned in the first sentence are general, and thus practically void; and this, so far as it refers back to that, is void also: and Congress can do nothing by virtue of either, for want of a special and particular authority. The clause means by "herein granted" the same as if it had been "hereinafter granted;" there being none granted before, special or particular. Very well, say the people once more, we will try again. We will this time say nothing about

the general purposes and duties of the whole government, and nothing about that portion of them which requires legislation; but we will go directly to Congress, and say what they shall do. "Congress shall have power" to do as follows, &c. But, says Mr. Madison, this is of no use: it is only a general authority, and authorizes no "particular measure." And Mr. Monroe says, "if we examine the specific grants of power, we do not find it [this particular measure] among them." This course of dealing would destroy any Constitution that was less comprehensive than all the statutes that might be called for to the end of time.

§ 318. "General" and "particular" are relative terms. Every power is general in respect to every particular which it includes and authorizes; and every power is particular in respect to the purpose which it is intended to effect, and for which it is authorized. Union, justice, tranquillity, defence, and liberty are particular and specific objects, in reference to the "general welfare;" and each of them is general in reference to all the particular acts by which they may respectively be promoted. The common defence is a general power in reference to the army, navy, militia, and every thing else that can be made conducive to it; and the army, navy, and militia powers are, in turn, themselves general, in reference to all the particulars involved in them. The commercial power is special and

specific in relation to the great ulterior purposes for which the government was established; and general in relation to bankruptcy, currency, post-office, &c., particularly mentioned in the Constitution; and also in respect to ships and waggons, passengers and freight, steamboats and locomotives, canals and railroads, and many other things not named, but equally involved, in it. The Constitution furnishes no apology for saying that general powers authorize no "particular measure;" or that they do not authorize any and every measure properly conducive to their accomplishment, and not otherwise prohibited. On the contrary theory of construction, what becomes of the power of taxation itself? This is general, and almost unlimited. Is it therefore void, because it is not afterwards reiterated in terms more specific, precise, and particular in the *subjoined enumeration of the cases* to which it shall extend? No such *subjoined enumeration* exists; and if the power "to pay the debts, and provide for the common defence and general welfare," would be void without it, the whole power of taxation is necessarily void also; and all taxes laid by the general government for preserving their own existence, or for any other special purpose whatever, are absolutely unconstitutional, because *that particular measure is not enumerated.* There is no end to the absurdities into which gentlemen lead themselves, by their attempts to prove by the Constitution

that we have no government for the United States.

§ 319. Second, The second head of inquiry in regard to the words "to pay the debts, and provide for the common defence and general welfare," is whether they confer a power to appropriate the funds arising from taxation to the objects named. Mr. Monroe says, in his exposition above cited, "On further reflection and observation, my mind has undergone a change;" and he proceeds to develop his new views as follows: "The grant consists of a twofold power, the first to raise, and the second to appropriate, the public money; and the terms used in both instances are general and unqualified. . . . The grant to raise money gives a power over every subject, from which revenue may be drawn. . . . The second branch of this power, that which authorizes the appropriation of the money thus raised, is not less general and unqualified than the power to raise it. More comprehensive terms than 'to pay the debts, and provide for the common defence and general welfare,' could not have been used," — "comprising[1] every object and act within the purview of the legislative trust."

§ 320. This would seem to be sufficiently broad for all practical purposes; but it is rendered much more so by another very correct principle, which he applies to the subject in the same con-

[1] As Mr. Madison also says, Veto, March 3, 1817.

nection. He says, "It ought particularly to be recollected, that, to whatever extent any specific power may be carried, the right of jurisdiction goes with it, pursuing it through all its incidents. . . . Each of the other grants is limited by the nature of the grant itself. This, by the nature of the government only." Congress, then, may appropriate money to any object within the range of legitimate legislation, and take jurisdiction of the subject-matter, "through all its incidents," so as to make it effectual for the uses intended, and regulate, protect, and perpetuate it therein. They may, of course, make all laws necessary and proper for these purposes. Mr. Monroe is very careful, in the same connection, to repudiate the idea, "that the words 'to provide for the common defence and general welfare,' . . . form an original grant, with unlimited power, superseding every other grant;" which it is presumed nobody ever held, in those terms or in any other, coming nearer to it than his own most mature "reflection and observation" have led him to adopt, and develop in the broad and comprehensive language above cited.

§ 321. Third, The idea under the third head is, that the words in question are used in the Constitution by way of qualification of the taxing power, limiting it to the three purposes thus expressed. Mr. Jefferson states the doctrine thus:[1]

[1] Opinion on the Bank, February, 1791.

"To lay taxes to provide for the general welfare of the United States, — that is to say, 'to lay taxes *for the purpose* of providing for the general welfare;' for the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. Congress are not to lay taxes *ad libitum, for any purpose they please;* but only to pay the debts, or provide for the general welfare, of the Union. In like manner, they are not *to do any thing they please*, to provide for the general welfare, but only to lay taxes for that purpose."

§ 322. According to this interpretation, then, Congress have the POWER to provide for the general welfare, in this one way at least, to wit, by laying and collecting taxes for that express purpose. Then it is a "*power*" vested by the Constitution in this department of the government. If this be so, then Congress have, by another provision of the same section, express power "to make all laws . . . necessary and proper for carrying it into execution." Whatever Congress may do under this or any other power, they must exercise jurisdiction over; see that the money devoted to it is properly applied, and made effectual for the purpose; and then protect and defend it in its future administration. What this power is, Mr. Jefferson instructs us, in another part of the same opinion. He says, that, considered as a "distinct and independent" power, it would be a "power to do whatever

would be for the good of the United States; and as they [Congress] would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased." How the power is different from this, if considered only as "describing the purpose" or object of taxation, he does not explain.

§ 323. He supposes the words in question are a limitation of the preceding power of taxation. "Congress," he says, "cannot lay taxes *ad libitum*, but only to pay debts," &c. All government is a trust, and can be rightfully exercised only for the purposes, and within the limits, of the fundamental law for the public good. The purposes and objects of our government are stated in the Constitution; and neither the public funds nor the public credit can be legally applied to any others. These limit the exercise of all the powers of the government, and this among the rest. These purposes are union, justice, tranquillity, defence, welfare, and liberty; and they are all included in the "common defence and general welfare," or rather in the "general welfare" alone. Any thing in the nature of a restriction of these must certainly be expressed in other and narrower terms. But the terms used in the 8th section are, "to pay the debts, and provide for the common defence and general welfare, of the United States;" and are as broad as the purposes of the Constitution itself, and co-extensive with them. So far are they from

forming a restriction on the power of levying and appropriating the public money, that they actually make the power, by express grant, co-extensive with all possible purposes of the government, instead of compelling them to rely on the implied power, which alone would have existed without them.

§ 324. These gentlemen all assume that the particular or special grants are all the powers the government have, and thence infer that the general grants are void or unmeaning. But they forget that the converse of the proposition is equally true; and that, if others choose to assume that the general grants are valid, then it will follow that the special ones are useless and void. So the argument is balanced, and good for nothing either way. Either their rule is false, or their application of it is erroneous. If the general and special powers of the Constitution are not incompatible, then their rule is not well applied. The foregoing theories are all effectually answered among themselves. Mr. Jefferson and Mr. Monroe both agree that these words mean something, and that Mr. Madison's theory to the contrary is untenable. Mr. Madison and Mr. Monroe agree that Mr. Jefferson's is so; and Mr. Jefferson and Mr. Madison agree that Mr. Monroe's is also. So there is a decided majority against each; and the majority in each case is undoubtedly right.

§ 325. Mr. Madison, in his report above cited,

gives the result thus: "Now whether the phrases in question be construed to authorize every measure relating to the common defence and general welfare, as considered by some, or every measure only in which there might be an application of money, as suggested by the caution of others, the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers which follows these general phrases in the Constitution: for it is evident, that there is not a single power whatever, which may not have some reference to the common defence or the general welfare; nor a power of any magnitude, which, in its exercise, does not involve or admit an application of money. The government, therefore, which possesses power in either one or other of these extents, is a government without limitations, formed by a particular enumeration of powers; and, consequently, the meaning and effect of this particular enumeration is destroyed by the exposition given to these general phrases."

§ 326. In regard to the practice of the government, Judge Story very justly remarks,[1] that "appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or their narrow sense." But though neither of the foregoing theories has commanded the assent

[1] 2 Com., 457.

of all who wished them success, nor proved sufficient to limit the legislation of the country within the narrow bounds they would indicate, yet they have been exceedingly useful to the slaveholding politicians, as a convenient make-weight, to divide their opponents, and defeat measures particularly uncongenial to their wishes, when it was found impossible to sustain their position on the merits of the question.

CHAPTER XXI.

LEGISLATIVE POWERS. — SPECIAL.

The Financial Powers.

§ 327. Fourth, THE fourth and only remaining head of inquiry is, whether the words, "to pay the debts, and provide for the common defence and general welfare, of the United States," actually confer the power thereby expressed, according to their plain, obvious, and legal meaning. The original proposition for putting these words into the Constitution was made by Mr. Sherman, of Connecticut.[1] He thought it necessary to connect with the taxing clause, "an express provision for the object of the old debts," &c.; and moved to add to it, "for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defence and general welfare." This was plainly an authority to pay — in the language of Mr. Sherman, "an express provision for" — the old debts,

[1] Not, however, till a determination had been manifested in the Convention to provide in some form for the actual payment of the Revolutionary debt.

and an equally express provision for new ones. No man had then doubted that Congress could incur debts and expenses, as the old government had done, for the public good, under the name of the "common defence and general welfare." But, says Mr. Madison,[1] "The proposition, as being unnecessary, was disagreed to."

§ 328. Why and how was this authority *unnecessary?* Not, certainly, because the object was disapproved, but because it was already provided for. In regard to the old debts, this was done by the sixth Article, which had just been adopted, recognizing the validity of those debts. In regard to new debts, this was done by the principle, that whoever may lawfully contract a debt is legally bound to pay it. Again, it was done, in regard to both, by the principle, that the debts were against the United States, and any government of the United States would be bound to pay them. It did not authorize the contraction of any new liabilities, or any debts or expenses for any new objects, but only to pay "expenses" lawfully incurred under other existing provisions. So the motion failed for this time; but Mr. Sherman was not satisfied.

§ 329. Three days afterwards, he obtained the appointment of a large committee, of which he was a member, to which this and several other subjects were committed. That committee reported the clause in the shape it now stands in

[1] 8 Madison Papers, 1427.

the Constitution, without the last line, on the rule of uniformity, which was subsequently added. This report was now adopted unanimously, though before it obtained but the single vote of Mr. Sherman's own State, which required the acquiescence of only a single man besides himself. Before, it was rejected because it was *unnecessary*. What is the difference in the two forms? In the original form, it simply gave authority for paying two different classes of debts, the old and the new. It was an authority to *pay* and *discharge* merely; to perform an admitted duty. This was unnecessary, because what was an admitted duty was to be performed at any rate, and no new provision could increase the authority or the obligation.

§ 330. In the new or present form, it is not only an authority to *pay* and *discharge* all debts, old or new indiscriminately, but an additional authority, not *to pay*, but to "*provide* for the common defence and general welfare." In this shape it passed the Convention unanimously. Why? They had just decided that a special power to pay debts was not necessary. They now decide that a power "to pay the debts, and provide for the common defence and general welfare," is necessary. The difference between the two propositions has been pointed out. The difference of judgment upon them must be in consequence of that difference, because there is no other. And both decisions were right, — the

first for the reasons above given; and the second, because the great purposes and objects of the government, disclosed by those words, had not till then found a place in the Constitution.

§ 331. It is to be recollected, that the introductory sentence, the enacting clause, had not then been formed. The only preface it then had was no part of the instrument, but a simple annunciation from without of "the following Constitution," but disclosing none of its purposes or objects. The other parts of the Constitution then were, and still are, equally reticent in this respect. The ultimate and final objects of this government, and of all government, with the power or means of obtaining them, first find their place in the Constitution here, and are afterwards copied, with explanatory enlargement, into the enacting clause. Their great importance rendered their insertion necessary, and this necessity commanded the unanimous assent of the Convention; and they were afterwards inserted in the first sentence, for the same reason, and with the same unanimous consent. As this reason is ample and sufficient, and no better one is wanted, it may well be presumed that this was the true reason for which the people also ratified and adopted it.

§ 332. This committee of Mr. Sherman's was a sort of *omnibus* committee, and what was called a grand committee, of one from each State, appointed on the last day of August. It

was a large and able committee, of which himself, Mr. King, Mr. G. Morris, Mr. Madison, &c., were members, and Mr. Brearley was chairman. Their duty was to report upon "such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on." On the 23d, the first clause of section 8 had been left in this form: "The legislature shall fulfil the engagements and discharge the debts of the United States, and shall have the power to lay and collect taxes, duties, imposts, and excises;" and, on the 25th, his addition "for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defence and general welfare," had been negatived; which, in his view, left the clause unfinished. Besides, on the 22d, the Committee of Detail had made an additional report, a part of which was in these words, and had "not been acted on," viz., "And to provide, as may become necessary, from time to time, for the well-managing and securing the common property and general interests and welfare of the United States, in such manner as shall not interfere with the government of individual States in matters which respect only their internal policy, and for which their individual authority may be competent." This was to be added to one of the last clauses of section 8; and, Judge Story says,[1] if it had been adopted, "would have created a general power to this

[1] 2 Com., 894.

effect." Because it had not been acted on, and the first clause was considered unfinished, this committee were authorized to report, and did report, a new draft, which was adopted unanimously, as follows: "To lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare, of the United States."

§ 333. To pay debts, and provide for the common defence and general welfare, may be called independent, or auxiliary, or ancillary powers; but they are certainly powers, and powers to be exercised. Debts must be paid, and defence and welfare provided for, whether taxes are laid and collected or not. Else what is the use of borrowed money, or the proceeds of public lands, or any other sources of revenue? So the laws must be executed, rebellions suppressed, and invasions repelled. These things may be done by calling out the militia; and they may be done by any other constitutional means as well, and perhaps better. "The truth is . . . it was deemed best to append the power to pay the public debts to the power to lay taxes; and then to add other terms, broad enough to embrace all the other purposes contemplated by the Constitution. Among these, none were more appropriate than the words 'common defence and general welfare,' found in the Articles of Confederation, and subsequently, with marked emphasis, introduced into the introductory clause

of the Constitution. To this course no opposition was made, because it satisfied those who wished to provide positively for the public debts, and those who wished to have the power of taxation co-extensive with all constitutional objects and powers. In other words, it conformed to the spirit of that resolution of the Convention which authorized Congress to 'legislate, in all cases, for the general interests of the Union.'"[1]

§ 334. Another historical circumstance, of some importance in this connection, is mentioned by Judge Story:[2] "The fact that, in the revised draft of the Constitution in the Convention, the clause [to pay the debts, and provide for the common defence and general welfare, of the United States] was separated from the preceding [to lay taxes, duties, imposts, and excises], exactly in the same manner as every succeeding clause was, viz., by a semicolon[3] and a break in the paragraph;" constituting them distinct and separate provisions, as completely as the two next, "to borrow money" and "to regulate commerce," were by the same means. In this form it was finally adopted by the Convention, and not afterwards altered otherwise than by the addition of the uniformity clause. This addition was made in the Convention, unanimously and without debate; from which we may safely infer

[1] 2 Story's Com., 395. [2] 2 Com. 371.

[3] This punctuation has since been altered, by substituting the *colon* for the *semicolon*, — probably by the same authority that added the numerals to the different paragraphs.

that no alteration in the construction or effect of the preceding clauses was intended or suspected.

§ 335. From this historical *resumé* of the subject, it is manifest, that, so far as the Convention is concerned, the words "to pay the debts" were introduced for the precise and sole purpose of adding a distinct and independent power to pay the old Revolutionary debts. "Defence" and "welfare" being introduced in the same manner, and following in the same category, must be understood as adding other distinct and independent powers, as they could not, in that connection, answer any other purpose. This conclusion is further rendered certain by the fact that these words, as the Convention adopted them, on the report of the Committee of Revision, constituted a separate and distinct clause by itself, — as much so as the power "to borrow money," or any other separate and distinct clause in the section.

§ 336. What "the people of the United States" meant by it, is, however, the only question; and this must be ascertained exclusively from the words they have used, for they have given us no other means. The words are there, and are intelligible and purtenant, and must be understood to mean something. We are not at liberty to assume, or even to argue, that they can have been put there for no purpose. This would contravene all known rules of legal interpreta-

tion.[1] That idea must therefore be dismissed. The only remaining ones are, — that "to pay the debts, and provide for the common defence and general welfare," constitute distinct and independent powers of Congress; or that they appertain to, and qualify the preceding power of, taxation. On these two theories, the following suggestions are made.

§ 337. The words are appropriate, important, and national in their character; and indicate such powers as belong to every independent government on earth. There is therefore no reason, in the nature of the powers, why they should not be conferred, and the words are apt and appropriate for conferring them; particularly when considered in connection with the same words repeated in the enacting clause, to announce the fundamental purposes for which the government was established.

§ 338. The same words used to express the avowed purposes for which the government was instituted, necessarily devolve these duties upon their legislative capacity, wherever that is deposited. All the legislative power granted to the government is vested in Congress. So that Congress must necessarily have this power, independent of this special grant; which is only another example of the pleonasms and repeti-

[1] "It is a most unjustifiable latitude of interpretation to deny effect to any clause, if it is sensible in the language in which it is expressed, and in the place in which it stands." — 2 Story's Com., 880.

tions which so much abound in our Constitution.

§ 339. The power of the "common defence" is once more devolved upon Congress by Article IV., section 4. "The United States . . . shall protect each of them [the States] against invasion." The United States is the government. The government, as far as respects legislation, is Congress. "Each of the States," in conjunction, make all the States. So Congress must provide for the common defence, independent both of the introductory clause and of the 8th section.

§ 340. It is certain, universally admitted, and never has been doubted by anybody, that Congress has in fact, and has always had, by means of a constitutional grant, a power "to pay the debts, and provide for the common defence . . . of the United States," and has always exercised it, without any reference whatever to the taxing power, directly or indirectly; and the power to provide for the "general welfare" is conferred at the same time, in the same connection, and in the same words, which must there mean the same thing, according to a well-known principle of law. If Congress may "provide for the common defence," they may also provide for the "general welfare;" for they are united by the copulative conjunction, and the same verb, "provide," applies to both.

§ 341. The payment of the public debt has never been considered as limited to the revenue

arising from taxation in any form, or so restricted in practice. The old Revolutionary debt was expressly provided for from several other resources; and all other debts are constantly paid, not only without reference to that revenue, but even when that resource is, as it has sometimes been, temporarily cut off.

§ 342. The common defence has never been provided for, solely, by the payment of money, and never can be; but when money has been applied to it, the appropriation never had reference to the revenue from taxation. In time of war, such a restriction would be ruinous. At the commencement of the late rebellion, the Treasury was empty; and a restriction of the means of defence to the acquisitions from taxation would have destroyed the country.

§ 343. The same is true in regard to the general welfare, so far as it has been practised upon at all, — in appropriations for the improvement of roads, rivers, and internal navigation generally. Even in the famous Bonus Bill, for creating a fund for internal improvement, which passed both Houses of Congress, no proceeds of taxation were proposed to be used. So that, practically, neither of these powers have ever been held to be at all appurtenant to, or dependent upon, the preceding power of taxation.

§ 344. But, lastly, it is of no consequence, and really makes no difference, as to the magnitude

or extent of either of these powers, whether they are considered as direct, substantive powers, or only as incidental and appurtenant to the taxing power. For if Congress may appropriate the public money of any sort, in either way, to these purposes, they must use the power so as to make it effectual for the purpose in view; and of course they may bring to their aid any other means within the range of legitimate legislation.[1] For, if the power exists in any form, it is a "power vested by the Constitution," and Congress have an express authority "to make all laws which shall be necessary and proper for carrying into execution" all such powers.

§ 345. Mr. Madison takes substantially the same view in a passage already cited;[2] and Mr. Justice Story says,[3] "The controversy is virtually at an end, if it is once admitted that the words, 'to provide for the common defence and general welfare,' are a part and qualification of the power to lay taxes; for then Congress has certainly a right to appropriate money to any purposes, or in any manner, conducive to those ends." The whole stress of the argument is, therefore, to establish, that the words, "to provide for the common defence and general welfare," do not

[1] "The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual exercise." — Mr. Chief Justice Marshall, in speaking for the whole Court, in Cohens *v.* Virginia, 6 Wheat. R., 428.

[2] Ante, p. 308.

[3] 2 Com., 441.

form an independent power, nor any qualification of the power to lay taxes. And the argument is, that they are "mere general terms, explained and limited by the subjoined specifications."

§ 346. All the powers granted directly to Congress by name, in distinction from those which necessarily devolve upon them as the depository of "all the legislative powers" required for the performance of the great purposes and duties for which the government was ordained, have been called "*special powers*," sometimes "*enumerated powers*," though they are not enumerated in the Constitution; because they are direct and express grants to Congress, without reference to their particular character, whether strictly legislative or otherwise. The power to borrow money, to call forth the militia, to admit new States, to govern the territories, &c., are not exclusively legislative in their nature, and might have been otherwise provided for. But they are all particular and specific powers of Congress, because they are specially and expressly granted to them, and do not depend upon any definition of the legislative power. Some of them are general, or in "general terms;" others more particular; and a few minute, as the power to alter the time of their own meeting. But none are so general as to be universal, and none so particular as to be indivisible. The most minute is general in respect to all the particular acts that might be done under it; and the most

general is particular, in respect to any thing more general that would include it with others.

§ 347. But the argument is predicated on the idea, that general and special powers are absolutely incompatible. If general powers are granted, including and absorbing any of the special powers, then the special powers are nugatory and void. If the special powers are valid, they must be all the powers, though the Constitution does not say so; and the general terms are void, and mean nothing. In the case of our own Constitution, and every other written one that ever was made, the people have attempted to grant both; and as one or the other, according to the argument, must be void, every man may take his choice. If he prefers an efficient national government, the general powers are adequate and sufficient. If he prefers local governments, or none at all, then he will, with Mr. Jefferson, "lace them [the national government] up strictly within the enumerated powers," always rejecting from the list those "general terms" which confer more than he wants; and then, whatever justice, tranquillity, safety, welfare, or liberty the State governments are able and willing to dispense, may be sought there, or obtained nowhere.

§ 348. So far as this controversy divides the opinion of honest and patriotic legislators, it tends to throw the practical power of deciding measures into the hands of unprincipled and

selfish politicians. If money is wanted to purchase new States, in order to change the balance of power, then with such politicians the general powers are valid and sufficient. If money is wanted by others for the internal improvement of the States we have, then with such politicians "general terms" are good for nothing, and the special power cannot be found. Such a government would be inefficient for all good purposes, and energetic only when in bad hands, to which it would constantly tend. It requires some philosophy, and more charity, to believe that the theory in question was not invented for this particular reason; and that it is not still pertinaciously defended out of respect to this particular end. All governmental power, not exercised under the supervision and responsibility of the national authority, will be very likely either not to be exercised at all, or to be so for partial and local purposes, inconsistent with general justice, and universal liberty and right.

§ 349. The power of Congress "to borrow money on the credit of the United States," is even more unlimited than the power of taxation. The amount, the terms, and the use, are all left to their discretion; and by the next section, 9th, the money may be appropriated, by law, to the promotion of any object calculated to effect either of the great purposes for which the Constitution and government were ordained and established by the people of the United States.

The remainder of the 8th section will be considered under the heads of the commercial power, the war power, and a few miscellaneous provisions.

CHAPTER XXII.

LEGISLATIVE POWERS.—SPECIAL.

The Commercial Powers.

§ 350. THE power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is very comprehensive. The words being general, the sense must be general also; and, like the preceding words, "common defence and general welfare," in the same section, embrace all subjects comprehended under them. Taken in connection with the particulars immediately following under the same head, — viz., naturalization, bankruptcy, money, weights and measures, and post-offices and post-roads, — it is difficult to conceive of any thing, in the line of mutual rights and duties, arising out of the peaceable intercourse of mankind, in the ordinary relations of civil life, internal or external, which may not be provided for under it. The word *commerce* includes not only trade and traffic, but every species of intercourse, personal or political, in all its branches, between nations and individuals, or parts of nations; with the

means of carrying on and sustaining such intercourse, whether financially, through the influence of currency and credit; or physically, by locomotive or transportation agencies; for persons or property, in vehicles or vessels, land-borne or water-borne, moved by cattle, wind, or steam, over earth or sea, by river, lake, canal, railroad, or highway.

§ 351. "To regulate" is to give the law, or prescribe the rule, by which all this intercourse is to be governed. Navigation is directly alluded to in the 9th section as a part of commerce, as it undoubtedly is; though it is so only as one of the means by which it is carried on, and is no more certainly so than any other mode of transportation or locomotion, applicable to the same purpose. "No sort of trade or intercourse can be carried on between this country and another, to which the word does not extend. Commerce is a unit, every part of which is indicated by the term, and must carry the same meaning through the sentence," as well to the domestic as to the foreign.[1]

§ 352. "With foreign nations" does not mean between them and the United States, as communities merely, but by all or any of the people of either with those of the other. So "among the several States" does not mean by one State with another in their corporate capacities (for this is expressly restricted by the 10th section), or by

[1] 9 Wheat. R.; 1 Gibbons *v.* Ogden; 2 Story's Com., 504.

the United States with any of them merely; but by all the people of the United States with all the people of any of the States, — which is by all the people of the United States with each other. "With the Indian tribes" means with all Indian tribes, whether within or without the boundaries of the United States, or any of them, both as communities and individuals. Trade and intercourse with them, in all its forms, is subject to the exclusive regulation of Congress.

§ 353. In the practice of the government, the commercial power has been applied to embargoes, non-intercourse, non-importation, coasting-trade, fisheries, navigation, seamen, privileges of American and foreign ships, quarantine, pilotage, wrecks, lighthouses, buoys, beacons; obstructions in bays, sounds, rivers, and creeks; inroads of the ocean, and many other kindred subjects; and, doubtless, includes salvage, policies of insurance, bills of exchange, and all maritime contracts, and the designation of ports of entry and delivery.

§ 354. Wherever the power of Congress extends, they are the exclusive judges of the proper reasons and motives for exercising it, and are not to be controlled by any allegation that it was done for a purpose not contemplated in the original grant. This commercial power has been employed for the purposes of prohibition, reciprocity, retaliation, and revenue, — sometimes, also, to encourage domestic navigation

and manufactures, by bounties, discriminating duties, and special privileges and preferences, and to regulate intercourse, with a view to mere political objects; and the right to do so has been sustained by the unequivocal voice of the nation.[1]

§ 355. Attempts have been made to exclude from the commercial power of Congress what has been called the strictly internal traffic of the inhabitants of a State among themselves. "But what regulation of commerce does not extend to the internal commerce of every State? What are all the duties upon imported articles, amounting in some cases to prohibitions, but so many bounties upon domestic manufactures, affecting the interest of different classes of citizens in different ways? What are all the provisions of the coasting Act, which relate to the trade between district and district of the same State? In short, what regulation of trade between the States, but must affect the internal trade of each State? What can operate upon the whole, but must extend to every part?"[2] If, in the opinion of Congress, the common defence, or general welfare, or the security of liberty, should be found to require their interference, in regard to any traffic or other intercourse among the inhabitants of any of the States with each other, or anybody else, it would be exceedingly difficult to exclude the jurisdiction of the United

[1] Ibid., 519. [2] Hamilton's Opinion on the Bank.

States, or to establish any exclusive right thereto, in any particular State.

§ 356. This power has been decided to be exclusive in Congress. The reasoning by which this decision is supported in the case last cited, is summarily stated by Judge Story thus: "The full power to regulate a particular subject implies the whole power, and leaves no *residuum*, . . . and necessarily excludes the action of all others who would perform the same operation on the same thing. Regulation is designed to indicate the entire result, applying to those parts which remain as they were, as well as to those which are altered." If it be admitted that this course of reasoning is sound and conclusive, it must also be admitted, that it is difficult to see wherein it is less applicable to any other subject over which the jurisdiction of Congress extends.

§ 357. Their authority in all is supreme, and paramount to all other. Nevertheless, it has been decided by the same court, that, in the case of bankruptcy, which is placed undoubtedly within the exclusive jurisdiction of Congress, if they do not act, the State laws are valid. And, in regard to this very commercial power, Judge Story says, in the same chapter, discussing the right of a State to authorize an obstruction to its navigable rivers and creeks, that, "if Congress has passed no general or special Act on the subject, the invalidity of such a State Act

must be placed entirely upon its repugnancy to the power to regulate commerce in its dormant state;" the adequacy of which he hesitates to affirm.

§ 358. So that in this case, as in others, the exclusive power of Congress over the subject would seem to amount to little more than the right to make their power exclusive, if they please; though it is said their will on the whole subject is manifested as well by what they leave unaltered, as by what they alter. By neglecting to act on any branch of the subject, they seem simply to authorize their subjects, personal and political, to be a law to themselves. Individuals would so understand it, in relation to matters coming within their exclusive cognizance; and State legislatures, or other political bodies, would be likely so to understand it, in relation to such things as they claimed a right to control. There being no constitutional prohibition, and no paramount law contravening their action, the authority of their own State constitutions would be apt to prevail.

§ 359. Besides this general power of regulating commerce in all its branches, the Constitution mentions several specific subjects, which, though included in the commercial powers, assist in explaining its scope and extent. They are neither specifications, limitations, nor extensions, but only specimens of the great powers included under the general head of regulating commerce;

and are equally valid as definite grants of power to Congress, whether they are embraced in one or more prior or subsequent grants of power, or whether they cover one or more other grants. The first of these is "to establish a uniform rule of naturalization." This, being a branch of intercourse with the people of other States, is obviously a part of the regulation of "commerce with foreign nations." A "uniform rule" has been held to carry with it the whole subject of naturalization itself, and to be, like commerce, exclusive of any authority, on the part of the several States, over the subject.[1]

§ 360. Though the authority is "to establish a uniform rule," Congress have never held their power limited to that, but always that it extended to the power of granting naturalization directly, either in individual cases or to whole classes of people, without regard to any uniform rule whatever. This power of naturalization, also, like all the other powers specifically vested in Congress, is so only as a part of the general powers of the government, and by no means as an addition to them. Congress would have had this power, by virtue of being the legislative department of the government, independent of this particular grant. And although it is here specifically named as a part of the law-making power, the grant has not been understood to include the whole power of

[1] 1 Kent's Com., 397; Chirac *v.* Chirac, 2 Wheat. R.; Houston *v.* Moore, 5 Wheat. R.; Golden *v.* Prince, 3 Wash. R.

the government over the subject. The President and Senate have, by treaty, repeatedly incorporated foreign territory, with all its inhabitants, granting all the rights of citizenship to all the people, of whatever race, color, or description. In every instance, it was agreed that they should, in due time, be admitted as States into the Union.

§ 361. In the case of Texas, a joint resolution of the two Houses of Congress, of March 1, 1845, authorized the admission of the Republic of Texas, in either of two modes, — by treaty, to be negociated by the executive with the Republic of Texas; or by the acceptance, on the part of Texas, of certain "terms, guaranties, and conditions," specified in the resolution. The annexation was made, in fact, by the acceptance of the propositions of Congress. So that the treaty was made directly with Texas by Congress, and not by the President, with the advice and consent of two-thirds of the members of the Senate, as the treaty-making power. In this way, the annexation was effected with the consent of only a majority of two in the Senate and about an equal proportion of the House, when it could not have been done by the constitutional majority of the Senate, as the treaty-making power. This Act affirms two propositions, — that Congress can make a treaty with a foreign nation; and that the President and Senate may do by treaty all that Congress did in this case by joint resolution.

§ 362. Texas was actually constituted a State in the Union under the Constitution, with all the rights of other States, necessarily including a foreign war, which Texas then had on hand, and a large war debt, which, by taking the nation and all its resources, we became bound to pay. Here was not only the naturalization of a whole nation of aliens, both bond and free, and an admission of a new State into the Union, which are, by the Constitution, within the express powers of Congress; but substantially a declaration, by adoption, of a foreign war, and an assumption of a foreign debt, both of which belong most emphatically to Congress. All these are included in the general powers and purposes of the government, as developed in the introductory or enacting clause of the Constitution, or they could not be rightfully exercised by any department of the government. Belonging regularly to the government, they devolve, on the distribution of its powers, so far as they require the making of law, upon Congress, which is invested with the whole legislative power of the Constitution. They also belong to Congress by this and other express grants. Nevertheless, it must now be considered as settled, by the practice of the government, the admission of Congress, and the acquiescence of the nation, that these powers also belong to the President and Senate, as the treaty-making power; for these treaties have all been sanctioned and held valid

by all departments of the government and people of the country, and continue in force to this day.

§ 363. So that, under this clause, Congress may not only make "a uniform rule of naturalization," but may directly confer naturalization itself without any rule; and the President and Senate may do the same by treaty, on the ground that it is a part of the great purposes for which the government was ordained and established, — "to promote the general welfare of the United States;" and as such not only devolves on Congress, as the legislative department of the government, but also on the treaty-making power, as a co-ordinate authority in establishing the law of the land, so far forth as it may properly be made a matter of compact or treaty between independent States. No department can exceed the general powers and purposes of the Constitution, as detailed in the introductory or enacting clause; and if any special power given to any department or officer should, on any construction, seem to go beyond them, the difficulty must be reconciled either by restraining such construction, or by considering such special power only as an instance or specimen, designed to show the breadth and extent of the general powers, of which it constitutes only a part.

§ 364. The next specific power mentioned in this 8th section, and belonging to the general head of the regulation of commerce, is "to establish . . . uniform laws on the subject of

bankruptcies throughout the United States." My Lord Coke derives the word *bankrupt* from *banque*, which is *mensa*, and *route*, which is a sign or mark; as we say a *cart-route* is a sign or mark where a cart hath been or gone. Others, among whom is Mr. Justice Blackstone, say it is derived from *banque* and *rumpue*, or *bancus* and *ruptus*, signifying *broken*. In either case, the meaning would be, that the *banque*, the table, or place of payment and discount, is broken up and gone. It designates metaphorically, and applies to, the man who cannot, will not, or at any rate does not, pay his debts or perform his pecuniary obligations. The defect may be voluntary, arising from dishonesty or fraud; or it may be involuntary, arising from inability or misfortune. In both cases the interest of the parties requires the action of the government, — the creditor to be secured against fraud, and the debtor to be protected against oppression.

§ 365. "Perhaps as satisfactory a description of a bankrupt law as can be framed is, that it is a law for the benefit and relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts. And a law on the subject of bankruptcies, in the sense of the Constitution, is a law making provisions for cases of persons failing to pay their debts."[1] The Constitution makes it the duty of the government to "establish justice;" which involves

[1] 3 Story's Com., p. 18, *note*.

the doing it themselves, and the administration of it among the people. It also prohibits the States from "impairing the obligation of contracts." The justice that enforces the exact or partial performance of a contract, or payment of a debt, in a particular case; and the justice that protects the violation of that duty, or discharges it, in whole or in part, under given circumstances, — covers the whole law of debtor and creditor.

§ 366. It decides when and in what proportions the debtor can and ought to pay a particular creditor, or all his creditors; and when and on what terms his creditor or creditors shall release him, or discharge the debt. This is the breadth of a law of bankruptcies. To this extent it seems to be required for the regulation of commerce; and short of this it could not stop, consistently with the next clause, which confers on Congress the power to fix the nature and value of the currency to be used in payments and exchanges.

§ 367. The words are: "To coin money, regulate the value thereof, and of foreign coin." Money or currency is an essential element of commerce. It is as much the means or instrument of trade as navigation or transportation is of intercourse, and is equally included in the regulation of commerce. "It is clear that the power to regulate commerce among the States carries with it, not impliedly, but necessarily and

directly, a full power of regulating the essential element of commerce, namely, the currency of the country, the money, which constitutes the life and soul of commerce."[1] But the Constitution has further particularized in the words of this clause. "Money" is the measure and representative of value. "To coin" it, is to form, fashion, fabricate, or convert into "money," any thing of which it may be made. To "regulate the value thereof" is to assign a value to it as money, — without reference to any value it may or may not have, as a material for other purposes than those assigned to it, — by making it lawful money.

§ 368. Congress is not restricted as to the materials they may make use of, or their worth or value, independent of their authorized use as money; nor is it required that they should have any such value. Even the operation of converting it into money is described only by the verb "to coin," which, if it means any thing in addition to the act of converting it into money, includes only the government stamp, by which the act is authenticated: and even this is doubtful, for, at some times, particular articles of merchandise have been made a legal tender as money, without a stamp; and, under our Constitution, foreign money has been similarly adopted, and made lawful currency, without any mark of our government upon it.

[1] Webster's Speech on the Surplus Revenue, 4 Works, 315.

§ 369. From the formation of the Union, in 1774, to the adoption of the Constitution, the money of the country was mostly paper. Such as was metallic was composed of gold, silver, or copper, with their respective amalgams and adulterations. These metals, with several others, have been coined ever since; and, at this moment, (1866), the principal material of our lawful money, in actual use, is paper. The Constitution makes no limitation to either of those materials, and no exclusion of either or of any other. The mention made in the 10th section, of "gold and silver coin," plainly shows that there may be other coin which is neither gold nor silver; and such was the fact then, has been ever since, and is so still. The valuation of "foreign coin," and the offence of counterfeiting "current coin," are not restricted to gold and silver, or any other material. These expressions all show that "coin," either as a noun or as a verb, has no fixed relation to any particular material, mineral or vegetable, but applies to any thing that may be made or authorized to pass in payments and exchanges as the lawful money of the United States, whether originally so denominated by our government, or in foreign countries.

§ 370. The power that prescribes what shall be money, at the same time prescribes what shall not be, and of course may determine what may or may not be used as substitutes or representatives of it. The government paper now form-

ing, almost exclusively, the currency of the country, is the money of the country. It makes no pretension to being a substitute or representative. All substitutes for money are redeemable in that; and that is redeemable in nothing, so long as it constitutes money, and is itself a legal tender for all the purposes of money.

§ 371. "To fix the standard of weights and measures" is another branch of the commercial power, having a similar relation to its principal as is occupied by navigation, transportation, currency, bankruptcy, &c. But it has never been exercised by Congress, and still remains a dormant power. In what position this leaves the law on the subject, has not been judicially decided or discussed. Is there any actual standard for the whole country? If so, what is it? Is it the one fixed by the English law, before the Revolution? If there is no common standard, is the one in use in the respective States, at the adoption of the Constitution, to be applied in each of them respectively; or one since adopted by any of them? Can any other department of the government adopt or apply a standard, temporarily or specially, under these or any other circumstances?

§ 372. That the power is exclusive, in the sense that it cannot be exercised by any whose jurisdiction is limited to a part of the country only, is most obvious. But is it exclusive in the sense that State legislation on the subject, under

all circumstances, is prohibited?[1] When a State government is expressly prohibited from doing a thing, as from granting letters of marque or coining money, their action on the subject would be absolutely void. When a power is limited to the general government exclusively, in express terms, as in the case of the District of Columbia, certain forts, dockyards, &c., any State legislation would also be void. In these two ways only, by an express prohibition or an express exclusion, does the Constitution directly, *proprio vigore*, take away or restrain the exercise of State legislation. When a power is simply delegated to the general government, such grant in no way directly interferes with State legislation or individual action. The exercise of the power may do both, or either; but the Constitution itself, by such a provision, does neither.

§ 373. If, from the nature of the power, the object and effect of its exercise is to make a uniform system of paramount law and administration for the whole country, it necessarily supersedes all inferior jurisdictions, and becomes exclusive, from its very nature; because any external interference with it would obstruct the national authority, and destroy the uniformity demanded. Of this nature are laws regulating foreign commerce, which have been decided to

[1] By the Act of 1866, Congress have authorized the use of the metric system of weights and measures, since the foregoing was written.

be exclusive. But if, without any such reason for an implied or consequential exclusion, a particular power is delegated to Congress, it is, though not necessarily exclusive, necessarily supreme; and, of course, Congress may, if they please, prohibit any interference with their authority, as well by addition as by subtraction.[1]

§ 374. An instance of this is furnished by the post-office. Congress has not only "established post-offices," but given their establishment an entire monopoly of certain kinds of business, even punishing as a crime any participation in them, by virtue of State authority or otherwise.[2] These principles are plain and practical, so far as they respect subjects that are single and indivisible. But when applied to subjects that are compound, involving particulars numerous and complicated, questions of more or less difficulty may arise. Take, for instance, the great subject of foreign commerce, — only one department of the whole commercial power. The Supreme Court have decided that it belongs to Congress exclusively. It includes particulars almost in-

[1] "It is obvious, that in those cases in which the United States may exercise the right of exclusive legislation, it will rest with Congress to determine whether the general government shall exercise the right of punishing exclusively, or leave the States at liberty to exercise their own discretion." — Houston *v.* Moore, 5 Wheat., 33, per Johnson, J.

[2] "This power is exercised by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post-office, or rob the mail." — Per Marshall, C. J., in McCulloch *v.* Maryland, 4 Wheat. R., 417.

numerable. Suppose Congress to have neglected the construction of a suitable lighthouse, breakwater, beacon, pier, or buoy, in some harbor within a State. It is a part of the power to regulate commerce. In what sense is it exclusive?

§ 375. Would it be unconstitutional for a man, interested in the navigation of the harbor, to set up a lantern to guide in his ship in a dark night; or even to induce his neighbors similarly situated, his insurance company, his town, city, or State, to join with him in defraying the expense of establishing and maintaining it? A standard of weights and measures for the country is also an exclusive national authority, not only as a part of commerce, but also from the extent of its operation; none but a national power being competent to it. But suppose the general government do nothing, — as they have heretofore done with this, and some other subjects delegated to them, — may not a man have a uniform standard for himself? and may not a town, city, or State adopt the same, or a different one, for all who acknowledge their jurisdiction, so long as they interfere with no paramount law? Such is the condition of the law of weights and measures. Congress, having all power over the subject, has never exercised it. Either the ante-revolutionary law remains in force, or such laws as any of the States may have made are substituted, or there is none.

§ 376. The power "to provide for the punishment of counterfeiting the securities and current coin of the United States," though expressly conferred, is necessarily an incident to the power of making, regulating, or authorizing the originals so counterfeited, and doubtless extends to every thing authorized to be used as money or currency. "To define and punish piracies and felonies committed on the high seas, and offences against the law of nations," is another commercial subject, given to Congress by a distinct and special grant. Piracies and felonies, as well as other offences against the law of nations, may be committed on the high seas; but, because so committed, they may not be exclusively cognizable under that law. If committed from or on board of an American vessel, and by persons owing even a temporary allegiance to the country, they are directly subject to our own municipal law, and so punishable, independent of the law of nations. But, whether such acts are violations of either or both codes, they are alike subject to the jurisdiction of Congress, unless within the municipal jurisdiction of some other nation.

§ 377. The high seas, the *locus in quo*, and the law of nations, the rule violated, both enter into the nature of the offence, and constitute a part of it, and of course require defining for the same reason. The law of nations, which is a part of the common law,[1] and like the rest of it

[1] United States *v.* Smith, 5 Wheat. R., 161.

an unwritten law, is here made expressly a part of our Constitution, to be enforced by our government.[1] The high seas may be defined by the common law, the civil law, or by the maritime law; but Congress are not bound by either. If the difference between piracy and robbery depends upon the line of high or low-water mark, or the state of the tide between them, Congress may define that difference. But the law of nations is a part of the law of the land, and to be executed as such by the proper departments, whether Congress define it or not. In this manner it may become the duty of the executive or the judiciary, or both, to find out what the law of nations is, and to punish the violation of it, even without any legislation.

§ 378. We have seen that the government, under the administration of Washington, undertook to know what were the duties of neutrals, by the law of nations, without any definition of Congress; and the judiciary were called upon and actually undertook to inquire, with a view to punish, the breach of them without legislative assistance. Both the executive and judiciary have had abundant occasion since to study the rights and duties of war, by the law of

[1] "As a part of the Constitution, written or unwritten, of all governments, stand the laws of nations, necessarily, inevitably, from the relations which all communities bear to each other, and from the contingencies to which they are exposed. That being the case, and that unwritten law of nations being actually a part of our written law, we accept, as we must accept, all the consequences which follow from it." — Senator Fessenden's speech on the Freedmen's Bureau, in the Senate, Jan. 28, 1866.

nations, without a definition by the legislature; and have found authority to execute them, in the principles of the common law, as the houses of Congress have found authority to punish for contempts, without legislation. The different codes referred to, and adopted by our Constitution, as constituting a part of our system, have to be carried into effect by the executive and the judiciary, whenever circumstances requiring their application are brought respectively under their official cognizance. But all "the laws necessary and proper" to render their execution adequate and effective have not been supplied by Congress. The decisions of the courts on this subject, and the clause of this section "to constitute tribunals inferior to the Supreme Court," will be considered when we come to Article III., on the judiciary.

§ 379. The only remaining topic of this section, directly connected with the commercial power, is "to establish post-offices and post-roads." By the authority of two short words, "establish post-offices," the government have instituted an establishment employing more men, controlling more patronage, and collecting and disbursing more revenue, than sufficed, within a few years past, for the administration of the whole government. In 1860, there were 28,586 postmasters. Mails were annually transported more than eighty millions of miles; and the expenditures were $19,170,609. The estimates for

the annual expenses are still kept within twenty millions; but there can be only slender reasons for the faith, that the receipts and expenditures of future fiscal years will not soon foot up to the formidable amount of forty millions of dollars. Of the aggregate amount of the whole army of officers, agents, contractors, and employees of the department, no enumeration has been found.

§ 380. The code of laws and regulations for hiring, purchasing, building, occupying, repairing, protecting, and improving the places of business; defining, extending, and defending the nature and character of their monopoly of the letter and newspaper transportation; and controlling, by fines, penalties, and punishments, all illegal interferences therewith, — would constitute a mass of learning sufficiently formidable to try the courage of any student whose duty it might become to collect, understand, and digest them. Notwithstanding the magnitude and extent of this important and formidable establishment, the whole of which has been built up and maintained, incidentally and inferentially, on so small a foundation, it has encountered fewer constitutional difficulties, and been subjected to fewer constitutional impediments, than any other important power of the government, though ever so elaborately defined and expounded, and though interfering much less with the daily lives and business of the people.

§ 381. The verb "establish," which covers the

whole action of the government in the case, is applied with the same force and directness to "post-roads," and of course has a meaning equally broad and extensive in regard to both subjects. Although this part of the clause has been the occasion of little legislation, in consequence of the multiplicity of roads and highways already established by other agencies and for other purposes, yet the words "establish post-roads" are a part of the Constitution, and may be applied to use, whenever a proper occasion for the purpose may arise. The idea that the government of the United States is dependent on the States or on private corporations, or any body else, for a right of way, over which to convey their mails, is not likely to be suggested by any body, or to be much heeded if it should be. The little that has already been done in that direction is sufficient to silence any such pretension, if there were any ground for making it.

CHAPTER XXIII.

LEGISLATIVE POWERS.—SPECIAL.

The War Powers.

§ 382. THE other great division of the powers of Congress, included in the 8th section, is the one embracing those necessary or appropriate to the "common defence of the United States." This great duty is devolved on the government, by its annunciation in the first sentence of the Constitution, as one of the purposes for which it was ordained and established by the American people. So far as it requires legislation, the duty is devolved on Congress by its being made the legislative department of the government, and vested with "all the legislative powers" thereof. It is again, and still more specifically and emphatically, delegated to Congress in the first clause of this section; which, as we have seen, either authorizes them to do it by raising and appropriating money for the purpose, or more generally, and without reference to money; and it is of no importance which, for in either case it is one of the powers vested in the gov-

ernment, and in this department of the government; and so Congress are to pass all laws necessary and proper for its execution.

§ 383. Several of the means for effecting this purpose are specified in this section. "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water; to raise and support armies; to provide and maintain navies; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for arming and disciplining the militia, and governing such part of them as may be employed in the service of the United States." These are commonly called the war powers, and are examples, but by no means specifications, of all the measures that may be adopted for the execution of the more general power and duty of providing for the "common defence . . . of the United States." They are all duplications of that power in part; and several of them are reduplications and pleonasms in respect to each other. The power to make and carry on war includes all the rest; and the power to provide armies and navies includes the power to regulate and govern them. The militia, when called forth as a part of the national forces, may be governed as such; and yet an additional provision is made for the particular purpose. The rights and duties of war are to be

exercised subject to the law of nations. Belligerent enemies and friends, non-combatant enemies and neutrals, whether nations or individuals, are alike to be judged by it; and a treatise upon the subject would involve a discussion of all the principles and usages of the law of nations.[1] But the rights and duties themselves, when ascertained, are to be executed and performed by such "necessary and proper" means, consistent with the law of nations, as Congress may adopt.

§ 384. As a declaration of war is not essential to its existence, and as a war may be made upon the country without it, so doubtless the United

[1] "The legal consequences resulting from a state of war between two countries, at this day, are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other; all intercourse, commercial or otherwise, between them, unlawful; all contracts existing at the commencement of the war, suspended; and all made during its existence, utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it, — are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved; and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries, on land or sea, are subject to capture and confiscation by the adverse party, as enemies' property; . . . all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted, as rights of war; and the law of prizes, as defined by the law of nations, comes into full and complete operation, resulting from maritime captures, *jure belli*. War also effects a change in the mutual relations of all states or countries, — not directly, as in the case of belligerents; but immediately and indirectly, though they take no part in the contest, but remain neutral. This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war." — Brilliant *et al. v.* United States, The Prize Cases, 2 Black's Rep.

States may make a war upon a foreign State without it. Within the present century, we have had three public wars. That with England, in 1812, was initiated formally by Congress with a statutory declaration. That with Mexico, in 1846, Congress declared was instituted by Mexico, without their agency. The last, with the Southern rebellion of 1861, had been in operation several months before Congress were convened to consider it, and never was declared at all. Armies and navies may be assembled and organized by voluntary enlistment, by draft, by requisition of militia, or perhaps even by impressment, or any other method in use among civilized nations. In calling out the militia, it has not been the most usual method to call them by regiments, brigades, and divisions, with their officers, in their organized state; but to require the number they want, in such form as they please. As they are authorized to govern them while in the service, they may doubtless organize and govern them by their own appointees, if that is judged to be the most expedient course.

§ 385. A declaration of war is essentially a declaration of martial law, — a substitution of war, the rights of war, and the laws of war; for peace, the rights and law of peace; the one coextensive with the other. It is not intended to be less a system of right and justice, or to exclude or supersede the ordinary administration of it, except so far as that may fail or be inade-

quate, or its processes come in competition with or impede the successful accomplishment of the paramount objects of the war. More than this would exceed the rights and duties of war, according to martial law; and less might compromit its success, which it is the whole object of martial law to secure. Every thing being at stake in war, when "the existence of the civil depends upon the military power,"[1] every thing must be made to contribute to its success, to the full extent of its necessities. Martial law, as a part of the law of nations, and of the common law, is a part of the Constitution of the United States and of the supreme law of the land. The rights and duties of belligerents and neutrals, whether nations or individuals, and the mode of pursuing them, are determined by it. When in force, — that is, in war, — it is in the hands of the same executive, under the name of commander-in-chief, who is bound to see to the execution of all other law; but he acts in this by an entirely different set of agents, and under an entirely different responsibleness. In the one, they are bound, for the time being, . . . to implicit obedience; in the other, they are expected to know and conform to the law. The Supreme Court have often disclaimed the administration of martial law, on the ground that it formed no part of the judicial power of the United States;[2] and it

[1] General Greene.

[2] "With the sentences of courts-martial, which have been convened regularly, &c., . . . civil courts have nothing to do, nor are they in any

is fortunate that it is so, for certainly no duty more ridiculously inappropriate could be imposed upon a learned bench of venerable judges, accustomed to listen, deliberate, and decide, by "bell, book, and candle," grave questions of civil jurisprudence, than to assign them to the prompt, extemporaneous, and sometimes arbitrary, direction of military operations and martial tribunals. These belong to military men, acting, for the time being, under a military responsibility, though their controlling head is a civil as well as military officer, bound by civil law, and to a civil accountability; to which also all military men are equally answerable at all other times. The complicated relations between the two systems, though vastly important and little understood,[1]

way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts." — Dynes v. Hoover, 20 Howard's Rep., 78.

[1] This at least is made abundantly manifest by the recent case of *ex parte* Milligan, in the Supreme Court, December term, 1866, whatever else may or may not be proved by it.

Since the above was written, the following has appeared in the Gazettes, as the view taken of the Milligan case by the Secretary of War: —

"I believe that Milligan was properly convicted. I am of the opinion, that a true exposition of the law of this country, and of every other civilized country of the globe, justifies me in saying that trials, convictions, and sentences, by military tribunals, were perfectly legal. I do not think that the decision in the Milligan case is justified by any principle of law recognized by any civil government on earth. It is wholly inconsistent with the protection of persons in the military service, or with the preservation of peace and safety in any State in insurrection."

The guilt of the party, in this case, was not denied or even questioned. "Judex damnatur cum nocens absolvitur."

are too extensive to admit of discussion here. It is obvious, however, to remark, that if no validity is allowed to the results of martial law in time of war, and no immunity is accorded to the necessary agents for administering it under orders from their superiors and the approval of the chief executive, both civil and military, of the nation, any longer than power remains in their own hands, — the instinct of self-preservation may sometime suggest to them the desire to postpone the period when they will be held personally accountable for all the evils that the exigencies of war, and the necessities of "common defence," may have brought upon individuals, however guilty or only unfortunate they may have been. The President, too, might sometime find himself in an awkward position, if — having appointed a military tribunal in time of war, accepted, approved, and executed its decision, in conformity to martial law — he should afterwards, in time of peace, be called upon, as "the executive," to hang a few of his military officers for obeying his own orders, when they would have been liable to be shot for disobedience had they done otherwise. If war, its rights, its law, — martial law, — is limited to operate only in places where the common-law courts are forcibly suppressed, the rebels should have held their Congress, managed their government, and concocted and directed all the military operations of their rebellion, from Indiana or Illinois, or even from Washington or

Baltimore, rather than from Richmond. There would have been no more danger from the interference of courts of law in either place, than if they had all been driven out by the enemy; as in that case they certainly would have been.

MISCELLANEOUS POWERS.

§ 386. The remaining items of the 8th section to be considered under this head are only three. "To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Authors and inventors had been held to be entitled, at common law, to a property in the results of their respective labors, long before the date of the Constitution. It was doubtless in recognition of this common-law right that this clause was inserted.

§ 387. The power has been exercised by providing for copyrights and patent-rights; but as the power includes both the object and the means, giving both to Congress, if they should grant copy and patent rights from other motives than to promote science and art, or if they should promote science and art by other means than securing the rights of authors and inventors, the discretion of Congress over the whole subject could not be controlled. It has not been held to be exclusively a power of Congress, nor

to extend to other modes of introducing and bringing into use valuable works of either sort, than by authorship and invention. Though care has been taken to prevent the copyright or patent-right from coming into the possession of any one but the party entitled, it has not been held that any summary mode of settling that right can oust the judiciary of its ultimate jurisdiction in settling all such questions.

§ 388. "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." This provision was not contained in any original or early draft of a Constitution, though the topics were all suggested in the South-Carolina Plan; but was, on the report of a committee, late in the session, adopted in its present form, without opposition. The territory to which it applies is distinctly described, and includes the governmental district and such "other places" as may be "purchased, with the consent of the legislature of the State," for the purposes named.

§ 389. In regard to the governmental dis-

trict, it must be ceded by the State. In regard to the "other places," they may be purchased of individuals; and the State has no other necessary concern with it than "by the consent of its legislature" to the purchase. Those things being done in the respective cases, the State in which the places are situated have relinquished, in the form required and rendered effectual by the Constitution, all their right of government or jurisdiction over them. The consequence is, that the general government, which before had the same authority over them that they had over the rest of the United States, now becomes the sole authority, to the exclusion of that of the State. These acts place the districts in question in the same relation to the government that the Territories stand by the 3d section of the fourth Article, subject to the exclusive legislation of Congress, — Congress being here and everywhere the legislature of the nation, and governing the whole land by virtue of the powers, and subject to the restrictions, of the Constitution.[1] "The power to 'make all needful rules and regulations respecting the territory or other property belonging to the United States' is not more comprehensive than the power 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the government."

[1] McCulloch *v.* Maryland, 4 Wheat., 422, the Supreme Court, per Marshall, C. J.

§ 390. The State transfers no political power, and does not purport to do so. The Constitution confers on them no such right. All the Constitution authorizes is to transfer, or consent to the transfer of, the title, and thereby to extinguish or relinquish their own political power *quoad hoc*. But the government of the United States takes no political power by transfer, and could not exercise it if they did. All their political power is held under, and by virtue of, the Constitution. This clause confers on them no new power, but the right to receive and hold the territory in question for the purposes specified, and then to govern it, as they do the rest of the country, under the Constitution, only exclusively; that is, "exclusive" of the State authority. The idea that, under the words "exclusive legislation," Congress can claim an absolute, unlimited, and boundless authority, independent of the provisions and restraints of the Constitution, is not consistent with the language or logic of the instrument. Who ever supposed that they could pass a "bill of attainder, or *ex post facto* law," or grant a "title of nobility," any more for the district of Columbia than they could for the rest of the country?

§ 391. The restraints of the Constitution are no more applicable to this clause than the grants are. Whatever of either belongs to the legislative power of the government, applies as well to the district as to the rest of the United States.

But this clause makes no addition to that power, the word "exclusive" being neither an enlargement nor a qualification. Congress may undoubtedly so legislate as to "provide for the common defence, promote the general welfare, and secure the blessings of liberty" there, which covers every thing that any good government can do, there or anywhere else; not because the power is granted by the words *exclusive legislation*, but because it is a part of the avowed purposes of the Constitution, and expressly delegated to Congress as the legislative department, to be exercised for the benefit of all the people of the United States.

§ 392. "In all cases whatsoever" is no enlargement of the power. If the power exists, it may be applied to all cases as well as to any. In the case of Cohens *v.* Virginia,[1] an attempt was made to consider Congress, when acting under this clause, as a mere local legislature, and not administering the supreme law of the land, by virtue of the general powers of the Constitution. But the Supreme Court held directly the contrary,—that the power belonged to "Congress, as the legislature of the Union; for strip them of that character, and they would not possess it. In no other character can it be exercised." . . . "Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature

[1] 6 Wheat. Rep.

of the Union."[1]—"Exclusive legislation" is sole legislation, *propria virtus*, not participated with another.

§ 393. It has been sometimes imagined, that Congress could do some things in those places not authorized to be done elsewhere. As instances of this kind, the establishment of a bank, an institution of learning, giving freedom to slaves, and granting the right of suffrage to colored citizens, have been frequently mentioned. But the idea is considered to be wholly erroneous. Not that these things may not be done, for most of them have been done; but that the authority for doing them is not local, or derived from this clause of the 8th section, but is general, and derived from the general and avowed objects of the Constitution, which constitute the rights and duties of the government, and are assigned directly to Congress by the 1st section, which makes it the legislative department, and vests in it "all the legislative powers" of the government; and again, by the first clause of the 8th section, which authorizes them specially "to provide for the common defence and general welfare,"—two particulars of the great purposes of the Constitution, and of all good government, which comprehend and include all others.

§ 394. It does not follow, that because the legislative powers of Congress, under the Con-

[1] Opinion of the Court, per Marshall, C. J., 6 Wheat. Rep. See also 5 Wheat. R., 317; Loughborough *v.* Blake.

stitution, are the same throughout the United States, it is expedient to legislate for all places in the same manner. The power of Congress over the district, &c., is "exclusive;" therefore every thing that is to be done there by legislation must be done by Congress. But, in the States, there are subordinate legislatures. These, though not acting by virtue of any grant from the Constitution of the United States, are still authorized by their State constitutions to legislate, in subordination to the restrictions and disabilities created by the national Constitution and laws. Congress may therefore leave to the State legislatures such portion, as in their discretion they judge proper, of the mere local interests and jurisdiction of the States, as are not expressly or impliedly prohibited to them, by or under the Constitution of the United States. It is on this ground, and for these important purposes, that the local governments are sustained.

§ 395. For the District of Columbia, &c., where no such local governments exist, Congress, having the "exclusive" power, must exercise the whole. There is a peculiarity in the mode of expression in this clause, which seems necessarily to indicate this distinction in its very terms. By the other clauses, "Congress shall have power to lay and collect," "to pay," "to provide," "to borrow," "to regulate," "to establish," &c., — terms which show an intention to delegate an original power of direct action. But here it is "Congress

shall have power to exercise . . . legislation;" that is, to exercise a power to make laws. It does not purport to grant an original power to make laws, so much as to grant a license to exercise, "exclusively," such a power already possessed. The real object and effect of the provision seems to be to prescribe a mode of extinguishing the State jurisdiction, and rendering their own "exclusive;" and not to make any new delegation of authority to the government of the United States, which was already ample without it.

§ 396. The Constitution of the United States is a fundamental law for the whole country; and, if it is adequate to the exigencies of government, it is competent to all the purposes for which any good government was ever instituted, over the whole United States, and every part thereof. The efficiency of the government is all derived from the Constitution, and is equal in all places within its jurisdiction. All their power is derived from it, and must be exercised under it, and is not different in kind, or greater in degree, in one place than in another. It is supreme everywhere. It is *inclusive* of all subordinate governments, where there are any; and *exclusive*, where there are none. It is permanently *exclusive*, if there can be no other. It is temporarily *exclusive*, till a subordinate is instituted. It becomes *exclusive* again, if a subordinate is extinct, whether by right or by wrong; and it remains

exclusive, when it is so, till a subordinate is rightfully restored.

§ 397. The last item in the 8th section is, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." This clause first appeared, in an abridged form, in the South-Carolina Plan. In its enlarged form, it was reported by Mr. Rutledge, from the Committee of Detail, and adopted without opposition by the Convention. By the Committee of Revision it was again reported, with a slight verbal alteration, making little addition and less improvement; and again adopted by the Convention, as it now stands, without opposition or discussion. It was, however, violently assailed before the people and in the State conventions. It was called the "sweeping clause," and represented as conferring new and indefinite, if not absolutely unlimited, powers of general legislation, for all purposes whatsoever.

§ 398. It was successfully defended, however, before both tribunals, and particularly in the "Federalist,"[1] on the ground that it was only declarative of a truth which resulted necessarily, by implication, from the fact of establishing a government vested with any certain and definite rights and duties. The powers so vested, what-

[1] Nos. 33, 44.

ever they might be, included the means of execution in the very terms of the grant, and extended to all means not excepted in the Constitution, not immoral in their nature, and not contrary to the essential objects of civil society. The principle has been repeatedly sanctioned by the Supreme Court, and stands in their reports, embodied in the forcible and exact language of Chief Justice Marshall, that a "power vested carries with it all those incidental powers which are necessary to its complete and effectual execution."

§ 399. But even this vindication, conclusive as it is, would almost seem to be a work of supererogation. Independent of this clause, the Constitution ordains and establishes a government for certain specified and avowed purposes, and divides it into three departments, constituting Congress the legislative department, and vesting in it "all legislative powers herein granted," — which can mean nothing else than all such powers rightfully held and to be exercised, in virtue of the Constitution, for the purposes thereof. What these are, can be determined by answering two questions, — What are legislative powers? and, What governmental powers require legislation? The first is answered by the lexicographers; the second by the application of a logical analysis to the terms of the Constitution. Both would thus be answered just as effectually, and in the same manner, as they are in this clause.

§ 400. The lexicographers tell you, that legislative power is an authority to make laws; and your dialectics will show you, that certain powers of the government, or purposes of the Constitution, cannot be properly executed without making laws. This is exactly what, and no more or less than, this clause asserts. It neither gives any new power, nor enlarges any old one. It simply defines the legislative power as granted to Congress by the Constitution; which would have been defined in the same manner, and almost in the same words, without it, — "power to make all laws . . . for . . . the execution of all the powers of the government."

§ 401. It is an exact and logical definition or description of the legislative power of Congress, as conferred by the Constitution; and states precisely what that power is, and would have been, and would have been known to be, if this clause had not been inserted. It is valuable and useful, because it is a plain and intelligible annunciation of important truth. It can be liable to no reasonable objection, not only because it is truth, but because it adds nothing, and alters nothing, in the Constitution, but leaves it just what it would have been otherwise. "If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if

that instrument be not a splendid bauble." [1] "The Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government, to general reasoning."

[1] Per Marshall, C. J., for the Court, in McCulloch *v.* Maryland, 4 Wheat. R., 420, 411.

CHAPTER XXIV.

LEGISLATIVE POWERS. — SPECIAL.

§ 402. BESIDES the duties specially assigned to Congress in the different sections of the first Article, others are so assigned in the subsequent Articles. By Article II., "Congress may determine the time of choosing the electors" of President and Vice-President in the States, "and the day on which they shall give their votes," in their respective States, "which day shall be the same throughout the United States." They "may by law provide for the case of removal, death, resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed, or a President shall be elected." But the office shall first devolve on the Vice-President, in case of such vacancy in the office of President.

§ 403. The duty of "providing" for an exigency necessarily involves the duty of ascertaining when it has occurred. Removal can be only by impeachment and conviction. Resigna-

tion or refusal, Congress have decided, can be proved only by writing, duly signed and delivered. But "inability," — what is that? If it is moral, it might perhaps be ascertained by impeachment and conviction before the Senate, and become removal or disqualification by judgment of law. If it is physical or intellectual, how is it to be dealt with? Is absence from the United States, voluntary or involuntary, a moral or physical inability to discharge the duties of the office? A similar difficulty might arise in ascertaining when the disability is removed. Congress has not yet provided for these exigencies beyond the accession of the President of the Senate, and Speaker of the House of Representatives respectively, in succession after the Vice-President, and then a new election of President.[1]

§ 404. By the 2d section of this Article, it would appear, that although the executive power is vested in the President, and he is bound to "take care that the laws be faithfully executed," yet he can appoint no officers to assist him in this duty, but such as are established by law; nor then even, without the advice and consent of the Senate, if in session, except in case of "such inferior officers" as Congress may authorize to be appointed by him alone, or by the courts of law or the heads of departments. Who are "such inferior officers" neither the Constitution nor any acts of the government has yet settled.

[1] Some additional provisions have more recently been made.

Doubtless they do not include either of those by whom "such inferior officers" may be appointed; but it would be difficult to establish an exclusion of any other officers whose appointment should be authorized in that manner by law.

§ 405. By Article III., "Congress may, from time to time, ordain and establish . . . inferior courts;" and, by section 8 of Article I., they have power "to constitute tribunals inferior to the Supreme Court." They are also authorized to regulate the appellate jurisdiction of the Supreme Court, as conferred by the Constitution, and to make "exceptions" from it; which "exceptions," as the whole "judicial power of the United States" is vested in the Supreme and inferior courts, must inure to the inferior courts. They have also, by the 3d section of Article III., express "power to declare the punishment of treason," — which they must necessarily have done in order to carry "into execution . . . the powers vested in the government," if this special provision had not been made.

§ 406. The preceding Articles are mainly devoted to the organization, jurisdiction, and mode of operation of the three departments of the government; and the second and third, being upon the executive and judicial departments, include, incidentally only, the legislative powers above specified. The subsequent Articles provide certain rules, regulations, orders, and precepts, on sundry important miscellaneous sub-

jects; but incidentally either delegate particular legislative powers expressly, or develop some general powers necessarily devolved or elsewhere conferred upon Congress, as the legislative department of the government. The first section of the fourth Article is, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

§ 407. The "faith and credit" of a record is its efficacy in establishing the fact which it asserts. The "faith and credit" of the "acts and proceedings" recorded, is their force and effect in relation to the subject-matter so acted upon. Evidence is either *prima facie* only, and impeachable by superior evidence, or absolutely conclusive and unimpeachable. "Full faith and credit" is that for which it was made, — what it has by law, when and where it was authorized and required to be made. Such a degree of credit, the "public acts, records, and judicial proceedings" of every State shall have in every other State, by constitutional right, independent of any legislation on the subject.

§ 408. But Congress may prescribe the manner of proving them, "and the effect thereof." Under this authority, Congress have, by Act of May 26, 1790, prescribed the mode of authenti-

cating the legislative Acts of a State, and the form of attestation for judicial records; and they provide that such judicial records shall have the same faith and credit, "in every court within the United States, as they have in the courts of the State from whence they were taken," but say not one word about "the effect thereof." The "effect thereof," like its "faith and credit," may apply to it as evidence of the fact recorded, or to the force and efficacy of the fact itself. Without saying whether it alludes to one or the other, or both of these respects, the Constitution says it shall have "full faith and credit;" and the statute reiterates that this is the "same faith and credit" it has in the courts of the State.

§ 409. It is well known, that, in a State where a judgment at law is rendered, the authorized record of that judgment has "faith and credit" beyond the simple fact that such a judgment was rendered. The judgment itself has "faith and credit" as a legal and final determination of the right in controversy, unless it is open to further proceedings under the law by which it was authorized. To this extent, "faith and credit" is the "effect thereof," and "credit" and "effect" are identical.[1] But if these terms are identical, then "full faith and credit" must include all "the effect" it has where it was made; and this by constitutional right. If, notwithstanding all

[1] Mills *v.* Duryee, 7 Cr. Rep., 481; and Hampton *v.* McConnel, 3 Wheat. R., 234.

this, Congress are absolutely authorized to "prescribe" "the effect thereof," then they may enlarge or diminish "the effect" so held to be included in its "faith and credit." At present the legislative provision does not reach it, in reference either to "public acts, records, or judicial proceedings."

§ 410. By Article IV., section 3, "new States may be admitted by the Congress into this Union." This power has received a construction in practice as broad and unlimited as its terms. Its only restrictions relate to pre-existing States, and will be reverted to under that head. New States have been created and admitted from territory originally included within the treaty limits of the country; from territory acquired since the adoption of the Constitution, by purchase, conquest, and treaty, from foreign nations; and, in one instance, by incorporating a foreign State entire, — government, laws, and people, — directly into the Union, as a component part of the nation, conferring citizenship alike on all its inhabitants, whether aliens, Indians, or slaves, and without distinction of race or color. With this practical construction of the Constitution, adopted and carried out by that school of our politicians habitually clinging to the most narrow construction of the powers of the government, it is difficult to see what territory or country or people may not be admitted, or for what adequate reason any can be excluded.

§ 411. After seeing the power of admitting new States thus broadly asserted and practised, we may consider whether by any and what means States thus admitted may get out of the Union. By being so admitted, a State becomes, if it was not before, a component part of the nation; and as this nation, no more than any other, ever made provision for its own dissolution, it is obvious that whatever of this nature is done, must be by wrong and not by right, — by force, and not by law. The Constitution guarantees them political existence as States, with republican governments; and duties, involving rights and powers, under the government. The question now is if this corporate existence as States may be extinguished, these republican governments cast off, and these duties and rights cancelled? If so, when and how? The constitutional guarantee, in the case of corporations, is just as broad as in the case of individuals, and in neither case does it imply any license to violate the laws, or the rights of others; nor any exemption from the appropriate penalties, if they do either.

§ 412. That bodies politic, though legally incapable of acting outside of their charters, do in fact, as well as individuals, really offend in both respects, and are held responsible in their corporate capacity therefor, is proved by every day's proceedings in courts of justice. All constitutional rights exist under the Union, and as such

can have no existence outside of the nation, or independent of it. Natural persons have natural rights, independent of the government; but artificial persons, having only artificial existence, cease, and their rights likewise, with the art that produced them. It results from this, that, if the nation itself is destroyed, the Constitution abolished, and the government extinct, the States and all their guarantees and rights, and every thing else held under, or by virtue of, the Constitution, would cease with it. This is one way that States may get out of the Union, — by the destruction of the Union itself. This way several of the States have lately tried without success.

§ 413. Another way is, by their own destruction. So far as respects actual physical destruction, in both cases there is no difficulty in understanding it. If the territory is sunk, and the government and people annihilated with it, it is clear there is no State left: being out of existence, it is, of course, out of the Union. But how is a State destroyed politically? If it is subdued, conquered, taken possession of, and governed by a foreign nation, it has lost its political existence as a State: it has become incorporated with a foreign State, and of course is not itself a State within the Union, or anywhere else; unless, indeed, the foreign State should do with it as we do, — call it a State, when it is in fact only an integral part of one.

§ 414. Again, if it becomes itself a foreign

State, by declaring and maintaining its independence and sovereignty as a separate State, it thereby loses its political existence and rights, as a component part of the Union, which constituted its only claim to be a State within the Union. If indeed it fails, by force, to maintain its declaration, the result is still the same. By making war, it has abdicated and repudiated all its rights and duties as a State in the Union, and it is not at its option to resume them at its own pleasure. Burlemaqui says war and abdication are the means of losing sovereignty. If by them absolute sovereignty may be lost, certainly any minor power short of that may be lost also by the same means. In the case of the rebel States, by becoming public enemies, their rights of every kind, under the government, have been lost by both. If they get them again, it must be by some process in conformity to the Constitution; and it will hardly be done without reason to believe that they will be used according to the Constitution.

§ 415. The corporate rights — the State rights — the political rights, under the Constitution, of an aggregate membership of the nation, having been all lost and thrown away, by solemn abjuration and war, would not be likely to be revived or restored to the same organization, even if the government could be assured of their acceptance, which they cannot be; because the party, having no corporate existence, has no power to

speak or act, as an aggregate body, on that subject, or any other. It has become absolutely necessary to begin anew. The territory and the population belong to the government, and will not be given up. They still form a component part of the nation. The local government, the State, the corporation, having abdicated and lost its political existence (and it would have lost it by the same means, if it had been a State under the law of nations), will necessarily be resumed by the government, and provided for in such form as the Constitution may be found to warrant. Those wicked husbandmen will be destroyed, and the vineyard given to others.

§ 416. Nor will the government be under obligation to give it to any body in the form and shape it was in before. It was originally a part of the national domain, and it is still theirs by the original right, as well as by the additional right of war. Its political rights are cancelled, and no body can claim them. New States may be formed in such manner, with such boundaries, such republican governments, and such other political rights, as the Constitution authorizes. But the first requisite to any reconstruction, as it should be to any original construction, is a loyal population of sufficient physical, moral, and intellectual power to be adequate to the support and maintenance of the government of a State in the Union, according to the principles of the Constitution. Without this no new State ever

ought to have been admitted, and no old State ought, in any form, to be resuscitated.

§ 417. A corporation may be dissolved by surrender of its franchises, or by *mis-user* or *non-user* of them. In the first case, the surrender should be accepted by the government; and, in the other, the matter should be inquired into by process of *quo warranto*, and the forfeiture judicially declared. Besides these methods of dissolution, there is obviously another, requiring no formality on the part of the government, and leaving them no option in regard to their action. If the corporation absolutely reject their franchise, abjure all its rights and duties, repudiate its privileges and immunities, and superadd actual war upon the nation, the government has no course left but to conform itself to the facts, and carry on its own operations as though the franchise had never been conferred.

§ 418. The civil divisions of the United States, contemplated in the Constitution, are called States, territories, governmental district, and forts, magazines, arsenals, dockyards, &c. These last probably could not be formed into States, on account of the unsuitableness of the materials and their location within other States, and still more because a State government would be inconsistent with the "exclusive legislation" delegated to Congress; the government district could not, because a State government would not only be inconsistent with the "exclusive

legislation" of Congress, but incompatible with the purpose of the Constitution in authorizing the cession. The United States had territories before the Constitution was made, and were under engagements with the inhabitants to form them into States and admit them to the Union. The fourth and sixth Articles of the Constitution enabled the government to fulfil those engagements, and to govern those and any future territories in the mean time.

§ 419. At the present moment, about one half of the whole national domain is subject to these territorial governments, which differ very little in form from the State governments, and might easily be made to differ less, or not at all. Still their inhabitants, though citizens of the United States, and entitled to all the rights and privileges of such, even if they amounted to a majority of the whole population of the country, could not exercise their portion of the national sovereignty. Nothing but a formal admission as a State, or an equally formal abolition of the difference between a State and a territory, which would amount to the same thing, could entitle the citizens inhabiting a territory to participate in the administration of the general government, by their suffrages for President, Senators, or Representatives, by whom the whole machinery is moved.

§ 420. Though the Constitution contemplates and authorizes these divisions, which have since

been made and organized, yet, at the time of its adoption, the only civil divisions of the country actually organized and recognized were called States. Under the British government, and afterwards under the Revolutionary government, till the Declaration of Independence in 1776, they were called colonies. Under the laws of the United States, they are, for some purposes, called districts. But in neither case, since the formation of the American Union in 1774, has the name of the subordinate divisions had any tendency to indicate their actual political position within the Union. For this purpose they might at any time, and might still, as well be called colonies, districts, departments, or territories, as States. Their political *status* is decided by the Constitution, not by the name.

§ 421. A State, by the law of nations, and in the family of nations, is "a sovereign political society, occupying an extended territory, and forming an organic, independent, and legal whole." A State, by that law and in that connection, is a nation, and the equal of any other nation in sovereignty, independence, and individuality. But "a State within this Union," and under our Constitution, is a very different thing. Instead of being a nation, it is only a component part of a nation, — and at the present time only a small part, — one thirty-seventh of the whole. It is a political society, to be sure, — that is, a corporation, a body politic; and, like other local

corporations for the purposes of government, occupies more or less territory, and is legally organized as an integral whole. So are counties, cities, and towns; which are distinguished from States, less by the extent of their territory and population than by the magnitude and permanence of their rights and privileges, and the nature of their organizations under the government. Some counties are larger than some States, and some cities have more population than several States.

§ 422. But the powers and privileges of a State, with a guaranteed republican government, depend on the Constitution of the United States; and their character and extent must be decided under its authority. Neither nationality, sovereignty, nor independence can constitute any part of them; because they must be adjudicated, in the last resort, by the tribunals of the nation. No power can be national, sovereign, or independent which depends on an extrinsic power for the vindication of its right. Every State officer is sworn to obey the Constitution of the United States; and every case arising under the Constitution may be decided, in the last resort, by its courts.

§ 423. These civil divisions being the principal, if not the only ones organized and in universal use at the time, were authorized and employed in the administration of the general government. Their number may be increased,

and has been; and probably, within certain limits, their organization and name might be changed: but, substantially, the citizens of the States must, by the Constitution, exercise their portion of the national sovereignty, by suffrage, in the State, or that section of the nation occupying the position and character of a State, where they reside; and nowhere else. If they do not reside in such a portion of the United States, they can have no vote in the election of those officers by whom the national government is administered.

§ 424. The last clause of the 3d section, Article IV., is, "The Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State." The succession of the new government to all the rights of property of the United States under the old government, is here distinctly recognized, as the succession to all their duties and obligations is recognized in the sixth Article. A change of government makes no alteration in any of these rights or duties, or in the laws by which they are to be understood and sustained.

§ 425. At the adoption of the Constitution, the United States had territory and other property, both in possession and in action; and this

clause recognizes both, and saves the adverse claims in the same position they were before. The express power here given to Congress "to dispose of . . . the territory . . . and other property belonging to the United States," is a necessary incident of the right of property, and with that right itself would have resulted to the government, and to this department of the government, if the clause had been wholly omitted. The additional power expressly given to Congress, "to make all needful rules and regulations respecting the territory and other property of the United States," has been the occasion of some discussion and some difference of opinion. It is not understood, that the requisite power to manage and appropriate the subject, as property, has been denied to be fully included under this grant, if any such grant can be held to be necessary or useful.

§ 426. But a much more extended power, for the purposes of civil and political government, has been claimed by some as embraced in this grant. Perhaps the terms are broad enough to warrant such a construction, if there was any adequate reason for adopting it, or any imaginable purpose to be answered by supposing them ever to have been used with such an intent. With or without this construction, the whole clause is sensible, correct, and just, in all its provisions and arrangements; and yet it is difficult to see in what one particular the matters therein

contained, or any of them, are placed in any different relations to each other, or to any thing else, than they would have occupied if no such clause had been in the Constitution.

§ 427. As to civil government, the territory mentioned in the clause, which was the only one then belonging to the United States, and which now constitutes five States in the Union, was a part of the United States before it became technically a territory, and certainly was not less so afterwards. The Constitution announces itself as ordained and established "for the United States," the whole country and every part of it; and that not merely as it was then, but as it might legally become at any time afterwards. It has been held to authorize accessions in divers ways; and they have actually been made, by the right of war, by purchase, treaty, and simple legislation. In all these cases, the additions are as much a part of the United States as the original territory, which made the first assumption and declaration of nationality.[1]

§ 428. If the government under the Constitution is the "firm national government" which the people demanded, adequate to the "preservation of the Union" and all the "exigencies of government, — competent to govern the whole country, — it is of course competent to govern every part of it; and most especially is it incumbent on it to govern that portion of the nation for

[1] Loughborough v. Blake, 5 Wheat. Rep.

which the Constitution has recognized no subordinate or ancillary State government for minor occasions, but left entirely dependent on the exclusive legislation of Congress. The government derives its existence, and all its rights, duties, and powers, from the Constitution; and, wherever these are exercised, they are in subordination to its principles and bound by its restrictions. They have the same supreme power over every portion of the country, and can exercise no other. Whatever rules individual discretion or local institutions adequately supply, the supreme government is not called on to provide. But, where these are wanting, the supreme government is the only resort.

§ 429. This constitutes the difference between the action of the government over the States, and those other portions of the country where, in default of State governments, the general government is necessarily exclusive, though no more supreme. The Constitution expressly transfers the property and the engagements of the United States to the new government; and it was complained of by its opponents, for the want of an express provision securing the enjoyment of the common law.[1] But was it not a work of supererogation to do either? The United States, previous to the adoption of the Constitution, had few general statutes, except those which grew out of the exigencies of the war, and expired with it.

[1] See 2 American Museum, 484; 1 Story's Com., 275, and 3 do., 506.

There were a few, however, that never were repealed, or otherwise abrogated or altered, either by the changes of the government or by any action of the government itself.

§ 430. During the early Administrations of the present government, the Acts, Resolves, or Ordinances of the Revolutionary and Confederation Congress are often alluded to, and brought into discussion in Congress, as laws still in force. In some instances, they are repealed or superseded. In others they are suspended or dispensed with in particular cases. In more they are enforced or adhered to, as the existing rule of decision, or law of the case, binding on the parties. These questions often, perhaps generally, arose out of the statutes of limitation, terminating, by lapse of time, certain claims against the government. But they all assume the force and validity of the statutes, as governing the case in hand; and thus recognize the continuance and identity of the State, in relation to its laws as well as to its rights and duties.[1] By an Act passed Aug. 5, 1789, it is enacted, "That the President of the United States be, and he hereby is, empowered to nominate, and by and with the advice and consent of the Senate to appoint, such person or persons as he may think proper, for supplying any vacancy that now is, or may hereafter take place, in the Board of Com-

[1] See the early volumes of the Annals of Congress, and Benton's Abridgment of Debates, *passim*.

missioners established by an Ordinance of the late Congress, of the 7th of May, 1787."[1]

§ 431. The Constitution neither cancels the rights, discharges the duties, nor repeals the laws of the United States, as they existed when it was adopted, any further than such rights, duties, or laws are inconsistent or incompatible with its own provisions. Among these laws, the Declaration of Independence and the Ordinance of 1787 have already been mentioned. The Declaration of Rights, by the first Congress, Oct. 14, 1774, is scarcely less important. It asserts, among other things, the right of all "the inhabitants of the English colonies in North America" . . . "to the common law of England;" and "that the foundation of . . . liberty, and of all free government, is a right in the people to participate in their legislative council." This, too, has never been repealed or become obsolete. The right of the people to choose Representatives to the national and State legislatures is actually embodied in the Constitution; and it not only contains nothing tending to abrogate the common law, but, in more than one instance, directly refers to it as an existing code, valid and authoritative, at least for some purposes.

§ 432. Several of the constitutional provisions would be wholly unmeaning without it; and others must be construed by it, and cannot be

[1] See the Act at large in vol. ii. of the "Laws of the United States," edition of 1815, p. 32; and Ordinance in the first volume, chap. 40.

understood independent of it. The distinction between "cases in law and equity," which the constitution recognizes (Article III., section 2), relates directly to the difference between the principles of the two codes of common law and equity, by which actions in judicial tribunals are classified and decided.[1] The seventh Amendment secures the right of a trial by jury "in suits at common law," and prohibits their re-examination otherwise "than according to the rules of the common law." Is it nevertheless true that we have no common law? What is the writ of *habeas corpus*?[2] Its substance, — its form? To what does it apply? What is its object? Whose is the *privilege* of it? What *right* does it restore; what *wrong* does it redress? Who is entitled to the *right*, and by what law? and how does the writ restore it? The answer to these questions is from the common law, and they cannot be answered without it. If there is no common law, this clause of the Constitution is inexplicable, — it, in fact, means nothing.

§ 433. If a change of government neither changes the laws, nor the rights and duties under the laws, how is it that the people of the United States have lost their right to the law, which their fathers brought with them to this land, which they used and approved, and transmitted to their children; which their children and their successors claimed as their birthright,

[1] 3 Story's Com., 506. [2] Article I., section 9.

and practised, under all the forms and changes of government through which they have passed; and which the present generation continue to use and practise, almost to the exclusion of every other? Yet it is *vexata questio* how far the common law, as used and approved in this country before the Revolution, through the Revolution, before the Constitution, and since the Constitution, may still be administered by the courts of the United States as a part of the law of the land.[1]

[1] Robinson *v.* Campbell, 3 Wheat., 223; Cox and Dick *v.* United States, 6 Peters' R., 203.

CHAPTER XXV.

LEGISLATIVE POWERS. — SPECIAL.

Amendments.

§ 434. The fifth Article, on the mode of amending the Constitution, is the last one that expressly confers special and specific powers on Congress for any purpose whatever. It is as follows: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution; or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first Article; and that no State,

without its consent, shall be deprived of its equal suffrage in the Senate."

§ 435. Here are three distinct powers conferred on Congress, and neither of them probably involved in the legislative portion of any of the general powers of the government. By the first, they may, by a two-thirds vote, themselves propose amendments to the Constitution. This has been held to be independent of the veto power of the President. A two-thirds vote in each House is all that would be required if the veto was interposed, and this is required without it. By the second, they may, on the application of the legislatures of two-thirds of the States, call a convention for proposing amendments. This power has never been used; and, of course, it has never been decided practically whether the "call" shall be presented to the President for his approval or not. The convention must probably be a convention of the people of the United States, by delegates chosen or appointed in each State: but in what proportion; when, how, and by whom chosen or appointed; where and when assembled; and how organized, governed, and restricted, — with other necessary preliminaries, must be settled by the power authorized to make the "call," for there is no other. By the third, Congress is authorized to prescribe the mode of ratification of the amendments proposed either by themselves or the convention by them called.

§ 436. This may be done by the legislatures of the several States, or by State conventions elected and held by virtue of the requisition of Congress, and in the manner by them directed. The wisdom, the utility, and even the necessity, of provisions for amending the Constitution have never been denied or doubted. But the second of those mentioned in this Article has never been tried, and it may be long before it is so. A simultaneous movement, by twenty-five or more different State legislatures, each composed of at least two distinct and independent bodies of men, in favor of a general convention of the people for proposing alterations of the fundamental law, without limit and without landmark, is a measure not likely to be resorted to for any other purpose than to destroy the government. Whenever so large a proportion of the American people become imbued with that purpose, it is safe to predict that they will march to their object by a more direct route than by procuring an amendment of the Constitution in this circuitous manner.

§ 437. The other method has been resorted to several times, at different periods of our history. The first time was at the first session of the first Congress. They proposed an addition of twelve Articles, in the nature of a bill of rights, most of them copied or modified from English or American models, for the purpose of conciliating a large class of citizens, who had been more or

less dissatisfied with the Constitution on account of its destitution of such a department. The deficiency had been most ably and elaborately defended by the friends of the Constitution, in the spoken and written debates on the subject, by reasoning which Judge Story pronounces had "much intrinsic force," though not "conclusive or satisfactory."[1] He adds in a note, "It had . . . extraordinary influence on the Convention; for, upon a motion being made to appoint a committee to prepare a bill of rights, the proposition was UNANIMOUSLY rejected. — *Journal*, 369."

§ 438. But this view is altogether illusory. The vote was taken on the 12th day of September, the last of the many times the subject came before the Convention, and just three days before the finished Constitution went into the hands of the engrossers. In his history of the Debates, Mr. Madison says the vote stood: New Hampshire, Connecticut, New Jersey, Pennsylvania, and Delaware, AY; Maryland, Virginia, North Carolina, South Carolina, and Georgia, NO, — five Northern against the five Southern States, Massachusetts being absent.[2] The question was thus lost. As the South would not consent to a bill of rights, the North, as is not unusual on such occasions, made a virtue of necessity, and permitted the official record to be made as it stands. But a bill of rights was excluded by slavery, and slavery alone.

[1] 3 Com., 716. [2] 3 Madison Papers *in loc.*

§ 439. This was afterwards distinctly avowed to the South Carolinians by General Charles Cotesworth Pinckney. He said, "Such bills generally begin with declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace when a large part of our property consists in men who are actually born slaves."[1] Amid all the sophistry that was wasted to reconcile the people of the North to the omission of a bill of rights, and to obliterate the fact that it was through the influence of slavery, here is a plain and honest statement of the exact truth; and it is the only instance where the truth on this subject was boldly and explicitly stated, responsibly vouched, and placed on record, so that to this day it can be seen and produced in evidence.

§ 440. Two of the proposed Articles[2] were

[1] 4 Elliot's Debates, 316.

[2] The second of the original series was in these words: "*No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened.*" When these were proposed, the Union consisted of eleven States only. Three of the eleven — viz., Massachusetts, Connecticut, and Georgia — have never acted on any of them. Before the others had all acted, the number of States had increased to fourteen, by the accession of Rhode Island, North Carolina, and Vermont, so that eleven, instead of nine, were required for their adoption. At this juncture, and before the admission of Kentucky increased the number to fifteen, it was found that eleven States had adopted the ten Amendments, leaving out the other two. The one above recited was negatived by Rhode Island, New York, New Jersey, and Pennsylvania, while agreeing to the rest; and only New Hampshire, Vermont, Delaware, Maryland, Virginia, North Carolina, and South Carolina agreed to this with the other ten. Thus seven States only have ratified this Amendment, and it has not since been taken up for consideration or re-consideration by any of the other States.

rejected; but the other ten were ratified by the legislatures of three-fourths of the States, and constitute the first ten of the Amendments now making a part of the Constitution. In these, certain particular rights are plainly declared or recognized, as natural, legal, and subsisting rights of the people, and so made their constitutional rights. They become a part of the supreme law of the land, and so bind the government, and all subordinate governments, — everybody, in fact, owing allegiance to the Constitution.[1]

§ 441. The opinion of the Court, per Mr. Chief Justice Spencer, says, "The Article in question [fifth Amendment] does extend to all judicial tribunals in the United States, whether constituted by the Congress of the United States or the States individually. The provision is general in its nature and unrestricted in its terms; and the sixth Article of the Constitution declares, that that Constitution shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding. These general and comprehensive expressions extend the provisions of the Constitution of the United States to every Article which is not confined, by the subject-matter, to the national government, and is equally applicable to the States."[2] — "The

[1] See People *v.* Goodwin, 18 John R., 187. [2] Ibid.

legislature of this State is as much bound by this [fifth Amendment] provision in the Constitution of the United States, as they would be were it contained in our own Constitution."[1] In the case of Houston *v.* Moor, 5 Wheat. Rep., Mr. Justice Johnson said, "In cases affecting life or member, there is [in the fifth Amendment] an express restraint upon the exercise of the punishing power. But it is a restriction which operates equally upon both [*i.e.*, national and State] governments." Mr. Chief Justice Marshall said,[2] "The Constitution of the United States was made for the whole people of the Union, and is equally binding upon all the courts and all the citizens." Mr. Chief Justice Taney said,[3] "The Constitution of the United States, and every Article and clause in it, is a part of the law of every State in the Union, and is the paramount law."[4]

§ 442. These rights are :—

1. The free exercise of religion, without any legal establishment thereof.

2. The freedom of speech and of the press.

3. The right to assemble and petition the government.[5]

4. The right to keep and bear arms.[6]

[1] Case of Dart. Coll., p. 59, per Jer. Mason, *arguendo*.

[2] In Farmers' & Mechanics' Bank, *v.* Smith, 6 Wheat. Rep., 131.

[3] Prigg's Case, 16 Peters' Rep., 628.

[4] *e. con.*, see Barker *v.* the People, 8 Cowen's R., 686; James *v.* Commonwealth, 12th Sergeant & Rawle's R., 220; Barron *v.* Baltimore, 7 Peters' Rep., 248. [5] In Article I. [6] In Article II.

5. To exemption from having soldiers quartered in his house, unless by law in time of war.[1]

6. To security from unreasonable searches and seizures and illegal warrants.[2]

7. To exemption from trial for infamous crime, unless on indictment by a grand jury, or in army or navy.

8. To exemption from more than one trial for the same offence.

9. To exemption from being a witness against himself in a criminal case.

10. To life, liberty, and property, till deprived by due process of law.

11. To just compensation for property taken for public use.[3]

12. In criminal cases, to distinct accusation, speedy public trial, impartial jury of the State where committed, witness personally present in Court, his own witnesses and counsel.[4]

13. To trial by jury in civil suits at common-law.[5]

14. To exemption from excessive bail or fines, and cruel or unusual punishments.[6]

15. The mention of particular rights not to disparage others not mentioned.[7]

16. A reserved right to all powers not delegated to the State or general governments.[8]

[1] Article III. [2] In Article IV. [3] In Article V.
[4] In Article VI. [5] In Article VII. [6] In Article VIII.
[7] Article IX. [8] In Article X.

§ 443. This mode of Amendment was next resorted to successfully, by the third Congress, and resulted in the eleventh Amendment. It effectually negatives all right in any individual, whether citizen of another State or alien, to sue a State of the Union, before a court of the United States, for any cause whatever. Citizens of the United States, not being citizens of any particular State other than the State sued, are not expressly mentioned. It unquestionably weakens the power of the government to that extent. It revokes so much of the original purpose of the people "to establish justice," as consists in the ability of the judiciary to do justice at the suit of the individuals mentioned, though suffering injustice from any State of this Union.

§ 444. The twelfth Amendment was proposed at the first session of the eighth Congress, and approved by the required majority of the State legislatures in 1804. By requiring the electors of President and Vice-President to designate on their ballots for which office each candidate is voted for, it takes away one of the contingencies on which an election of President might devolve on the House of Representatives.

§ 445. An unsuccessful attempt to alter the Constitution was made at the second session of the thirteenth Congress. It failed for the want of the requisite number of State legislatures to support it.

Near the close of the last session of the thirty-

sixth Congress, in February and March, 1861, after seven of the Southern States had passed their secession Ordinances, and their Senators and Representatives had taken formal leave of Congress, the following amendment was passed by a two-thirds vote in each House, viz., "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." Two days afterwards, President Lincoln, in his Inaugural Address, said, "that, holding such a provision now to be implied constitutional law, I have no objections to its being made express and irrevocable." But, as it was not wanted by anybody for any other purpose than to pacify the Southern States, and as they refused to be pacified by it, it was never taken up or acted upon by the legislature of any State, and so fortunately failed to encumber and disgrace the Constitution.

§ 446. The thirteenth Amendment, abjuring slavery throughout the United States, was proposed by the thirty-eighth Congress at their last session, Jan. 31, 1865. Thirty-six States had then been admitted to the Union, eleven of which were at that time carrying on a civil war in rebellion against the government. Of the remaining twenty-five States, twenty had adopted it in five months (June 30). Three others, Oregon,

California, and New Jersey, adopted it afterwards, and within a year from the time it was proposed, leaving only two of the twenty-five, viz., Delaware and Kentucky, who objected. On the 18th of December, however, and before Oregon, California, and New Jersey had adopted it, Mr. Secretary Seward issued his official proclamation, announcing that twenty-seven States, or three-fourths of the whole number admitted, had adopted it, and it was therefore a part of the Constitution. To make this out, he had to include seven of the States in rebellion, viz., Virginia, Louisiana, Tennessee, Arkansas, North Carolina, South Carolina, and Georgia. If these States had then no organized government under the Constitution, so as to be capable of acting for their people and legally binding them by their action, the Amendment could not have been legally ratified till twenty-one or more of those States which had such constitutional governments had actually ratified it as the Constitution requires.

§ 447. We have heretofore seen that the Constitution, as it originally stood, never authorized slavery or property in man, in any form or under any name; and that the personal rights of the citizens, whether natural-born or naturalized, recognized and covered by it, are altogether incompatible with the existence of any such relation among the people. So that the only legal operation of this Amendment was to re-assure

the original Constitution in this respect, and to negative and countermand, in express terms, the system of violence and injustice that had been illegally and studiously fostered and extended, under a false construction and maladministration of an instrument adapted and intended to effect its decline and extinction. The 2d section of the Amendment does a similar work of supererogation, by authorizing Congress "to enforce" this particular provision, when they had abundant authority for executing the whole Constitution without it.

§ 448. The fourteenth Amendment was proposed in June, 1866, by the thirty-ninth Congress at their first session, by a vote of three-fourths of the Senate and more than that of the House, and is now, 1866, in the process of adoption by the State legislatures.[1] In respect to the powers of the government, it is of the same general character as the last. It re-affirms some pre-existing powers, but adds no new ones. It makes some wholesome provisions which Congress were fully authorized to have made themselves, but could not have prevented a future Congress from unmaking. The first section is in these words: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States

[1] It has since been adopted by more than three-fourths of the twenty-seven States, now (1867) actually composing, by participating in, the government.

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws." This will scarcely be claimed by anybody to delegate any thing new to the government, or to prohibit the States from doing any thing which otherwise they might rightfully do.

§ 449. The 2d section begins, "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed;" almost in the exact words of the 2d section of Article I., leaving out those which discriminate between such as are counted as integers and as fractions. By a different collocation of the words, however, and their connections, it will bear upon some questions that have been made upon the original. Who are the "*persons in each State*" to be counted? Citizens, inhabitants, residents — temporary or permanent, strangers, aliens, Indians, &c.? "Indians not taxed" are now altogether excluded; although before it was by some considered doubtful whether they were excluded only from the first class. This total exclusion is compatible with the preceding section, only on the ground that the Constitution has made them

aliens, and so not "subject to the jurisdiction" of the United States, otherwise than aliens by temporary residence; for otherwise they are, by that section and by birthright, actual "citizens of the United States, and of the States wherein they reside."

§ 450. If Indians, who are natural-born citizens of the country, are excluded from the basis of representation by an alienage created by a legal and artificial denaturalization, *a fortiori* natural-born aliens should be excluded also. Certainly, persons who are at the time actual citizens of other States in the Union cannot be included; and, for much stronger reasons, persons who are citizens of foreign States should not. These inferences are strengthened by the provision afterwards made for reducing the basis of representation, in case of an unlawful denial of the right of voting. "The whole number of persons in each State" cannot mean everybody on the soil at the particular time, nor exclude everybody who may happen not to be on it at the same time, and of course should be authoritatively construed by the law-making power.

§ 451. The residue of the 2d section is, "But whenever the right to vote at any election for electors of President and Vice-President of the United States, Representatives in Congress, executive and judicial officers, or the members of the legislature thereof, is denied to any of the male inhabitants of a State, being twenty-one

years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." This distinctly recognizes an absolute right in certain citizens to vote for certain national and State officers at any election of those officers. But this is no new thing in the country or in our Constitution.

§ 452. The fathers of our Revolution, when they laid the foundations of our nationality, in their first Declaration of Rights, in Congress assembled, Oct. 14, 1774, solemnly declared, that "by the immutable laws of Nature . . . the foundation of . . . liberty, and of all free government, is a right in the PEOPLE to participate in their legislative council." In exact accordance with this fundamental principle of republicanism, it is provided in our Constitution, by Article I., section 2, that "Representatives shall be . . . chosen . . . by the people [citizens] of the several States." If they must be chosen by the citizens, then the citizens have a right to choose them, and must choose them; and who has a right to say that any citizens shall not, and that any but citizens shall, choose them?[1]

[1] This has no reference to forfeiture. A man may forfeit his life, and of course any other right. Nor does it refer to the necessary

§ 453. The same section 2 declares that the "electors of the most numerous branch of the State legislature" must have the same qualifications, and by necessary implication must be the same citizens. For if the qualifications of the electors of Representatives in Congress are citizenship and residence only, being "people of the several States" respectively, and fixed to that by the Constitution, it follows conclusively that "the qualifications requisite for electors of the most numerous branch of the State legislature" must be precisely the same citizenship and residence, and no other, or the two cannot be alike. Besides, the Amendment itself expressly recognizes "the right to vote at any election" of certain officers, State as well as national, as appertaining to every male citizen of twenty-one years of age, and which cannot be rightfully denied or abridged, except for rebellion or other crime. This shows that the word "qualifications," as here used, has no reference to any limitation of the constitutional right of the citizen to the suffrage; but only to such regulations of the time, place, and circumstances as may be judged necessary for the effectual security and beneficial enjoyment of the right.

§ 454. The next idea is, that if any State shall

guardianship which God has provided for the infant and imbecile portion of the race. The right of suffrage, as a part of the right of citizenship, has always been recognized before the Constitution and under it.

unlawfully deny or abridge this constitutional right of the citizens, they shall lose a proportionable part of their delegation. Here is certainly no increase of power in the government. It was their duty before to execute the Constitution; and if a State should not allow their Representatives to be "chosen by the people," according to the Constitution, they could not rightfully be admitted to their seats; and the States so offending were, and still are, liable to lose their whole delegation instead of only a part of it. It will be noted, also, that the reduction of the basis is to be in the proportion of the illegally disfranchised voters to the whole of the legal voters; justly presuming that all the adult males represent an equal proportion of females and minors. But if the basis might include aliens or others who are not citizens, they would be represented in full, though one half, three-quarters, or any other portion short of the whole of the legal voters, should be actually deprived; and thus the favored few of the citizens would not only choose their own Representatives, but also Representatives for such aliens or others as might be so included in the basis; so that their relative power as citizens would be increased, rather than diminished, by the reduction of the basis.

§ 455. But this remedy, by diminishing the basis of representation, is cumulative only, — an addition to, and not a substitute for, any other

remedy that Congress might have applied, and may still apply, for an injurious and unwarrantable interference with the elective franchise of citizens, by the State governments or others, independent of this Amendment. This Amendment enacts a new remedy that Congress could not have enacted without it, because it interferes with the constitutional basis of representation; but it neither increases nor diminishes the power of the law-making department of the government, "to make all laws necessary and proper for carrying into execution," — asserting, protecting, and defending "the right to vote at any election," here, as elsewhere in the Constitution, expressly recognized and admitted to appertain to every male citizen of twenty-one years of age, whenever it may be unlawfully "denied" or "abridged," neither of which can be lawfully done, "except for participation in rebellion or other crime."

§ 456. The 3d section is, "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the

same, or given aid or comfort to the enemies thereof; but Congress may, by a vote of two-thirds of each House, remove such disability." The offences here described are all of them treason, with the aggravation of perjury, which Congress was expressly authorized to punish, in any manner they pleased, by Article III., section 3.

§ 457. The 4th section, so far as it recognizes "the validity of the public debt of the United States," and the invalidity of "any debt or obligation incurred in aid of insurrection or rebellion," certainly makes no alteration in the previous law of the land. So far as it renders "illegal and void". . . "any claim for the loss or emancipation of any slave," it is restrictive, and a diminution of the power of the government as well as of the States. The fifth section says, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article;" which of course they have by the original Constitution, as soon as it becomes a part of that Constitution.

§ 458. Thus it will appear, by a minute analysis of this fourteenth Amendment, that it contains no augmentation of the powers of the government. But it is especially incumbent on the American people to watch narrowly every amendment which may be proposed, and see that there lurks not, under some plausible covering, any latent mischief which may sap and undermine

the foundation of some efficient support to the constitutional fabric which it cost our fathers so much to raise, and their children so much to defend.

§ 459. There has been some question made as to the extent of this power of amendment under the fifth Article of the Constitution. It contains but two express restrictions; one of which has become obsolete, and the other is, "that no State, without its consent, shall be deprived of its equal suffrage in the Senate." While the Article declares that amendments proposed and ratified in the manner therein prescribed "shall be valid, to all intents and purposes, as part of this Constitution," it will be difficult to establish any restriction beyond what is written.

From this *resumé* of the Amendments heretofore made, it will readily appear that no addition has been made thereby to the powers of the government. It will also appear that those powers have sustained very little damage from such restrictions and limitations as those Amendments contain.

CHAPTER XXVI.

LEGISLATIVE POWERS.

Restrictions.

§ 460. HAVING thus briefly examined the legislative powers of the government as vested in Congress, by general and special delegations, express and implied, we come next to consider the limitations and qualifications under which these powers are granted in the Constitution. 1st, It has already been remarked that the terms by which the legislative power is "vested in Congress" (section 1), are, to a certain extent, restrictive *ab initio*. "All legislative powers herein granted" excludes those not herein granted. A government, or a power to govern, includes a power to make and execute laws; and a limited government must make its laws within its limitations. The law-making department of such a government cannot extend beyond the purposes and objects to which the government is restricted. It must govern in the prescribed manner; and all the legislative, executive, and judicial power requisite for this is necessarily "herein granted," and no other is.

§ 461. So "all the legislative powers herein granted" are only the law-making power required for administering the government and executing the Constitution. This is what it would necessarily be, independent of any further constitutional definition. But the 8th section gives it expressly the same definition almost in the same terms, — "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

§ 462. 2d, In regard to taxation, by the third clause, 2d section, Article I., "direct taxes," which have been construed to mean taxes on buildings, land, and persons, "shall be apportioned among the several States . . . according to their respective numbers;" and by clause 1, section 8, "duties, imposts, and excises," which are indirect taxes, "shall be uniform throughout the United States." The exactions of the government upon the people for revenue are all of them taxes, and are direct or indirect. All direct taxes must be laid by the rule of apportionment; and all "duties, imposts, and excises" must be laid by the rule of uniformity. The line of distinction between direct and indirect taxes has not been very sharply drawn. But, if there are any indirect taxes not falling under the head of

duties, imposts, or excises, there is no constitutional difficulty in their being laid by either rule, or by any other, consistent with justice.

§ 463. Since the alteration of the Constitution making every man a unit in the enumeration of the census, the only substantial difference is, that, by the first method, taxes are to be laid or distributed among the States in proportion to their population; and, by the second, they are laid upon individuals, without reference to their locality, according to the use and distribution of different kinds of property. The first supposes, that the quantity and value of the property so taxed is everywhere according to the number of the people; or, in other words, that every aggregate community has a similar amount of that kind of property in proportion to its number of people. The other supposes, that every man chooses for himself the investment and appropriation of his property, and so becomes his own assessor, by selecting the kind of property he will hold, and the use he will make of it. The theory of the first, or rule of apportionment, is so manifestly erroneous, that it was seldom resorted to before the adoption of the thirteenth Amendment, the want of which was the sole occasion of the rule. It may now be presumed, that the rule itself, as a practical one for the levying of any kind of taxes, will soon become entirely obsolete.

§ 464. By the fifth clause, section 9, "No tax

or duty shall be laid on articles exported from any State." This has been understood to prohibit all duties on exports; but it has been contended that it only applies to discriminations against "any State," in distinction from others. Judge Story says, speaking of this clause, in connection with the next sentence, respecting the prohibition of any preference of ports of one State over those of another, &c., "The obvious object of these provisions is to prevent any possibility of applying the power to lay taxes or regulate commerce injuriously to the interests of any one State, so as to favor or aid another. If Congress were allowed to lay a duty on exports from any one State, it might unreasonably injure, or even destroy, the staple productions or common articles of that State."[1]

§ 465. If this was the whole object, it may well be effected without construing the clause to intend a total prohibition of all taxation on exports; and their combination and juxtaposition in this clause has been used as an argument to prove that such was the whole intent of the clause, and should be held to be its whole effect. The original wording of the clause was "on articles exported from the States;" which were afterwards altered to the present reading. But no legislative or judicial exposition of the phrase has been made. "Appropriations of money,"

[1] 3 Com., 469; Rawle on the Constitution, 115; North-American Review, July, 1865.

which by section 9, clause 6, must be "made by law," for any of the purposes of the government, by section 8, clause 12, shall not be made for the use of the armies "for a longer term than two years."

§ 466. 3d, The reservation in the sixteenth clause of the 8th section, in favor of the States, of "the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress," when they are not "employed in the service of the United States," is a qualification or postponement of the power of Congress in that regard, but not a negation of it; so that there must necessarily be a failure in the performance of the duty in case the States, or any of them, should refuse or unreasonably neglect to perform it. To perform it themselves would probably be the most effectual rebuke of the default of the subordinate government.

§ 467. 4th, By the first clause of section 9, "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year eighteen hundred and eight." The only *persons* they wished to prohibit were slaves, whose importation was already prohibited by all the States but three. Four new States were afterwards admitted during the restriction; so that, during the whole time, the slave-trade might have been prohibited in ten old States and

all the territories, and after 1802 in four new States besides. But this never was done, or even the authorized tax imposed on the importation, for the same reason that nothing else was done in disparagement of slavery.[1] The clause is now obsolete, and only remains on the face of the Constitution, to be used in argument that the Constitution expressly recognizes slavery, when it says not one word about it; though it contains many provisions which would authorize the government to operate upon it, as well as upon all the other interests of the nation.

§ 468. 5th, "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." This is in the nature of an article in a bill of rights. What the right or privilege is, who are entitled to it, and for what wrong, are questions that can be answered only by the common law. By that we know that the writ was a remedy for the loss of personal liberty, and that both the liberty and the remedy were of common right. This was the law which our ancestors brought with them to this country; which they and their successors used, in every State in the Union, to the time of the adoption of the Constitution, and which that rendered perpetual: for if the writ cannot be "suspended," or rendered temporarily invalid, *a fortiori* it cannot be repealed, or rendered permanently

[1] Ante, p. 134.

invalid. That would be "to strain out the gnat, and swallow the camel."

§ 469. No special provision is made against a repeal of the law, because, the writ being recognized as a personal right or privilege, in the Constitution necessarily becomes a part of it, and as permanent and irrepealable as the Constitution itself. The clause has no special reference to Congress, or to any other department of the general or subordinate governments; but applies equally, and at all times, to every one subject to the laws of the land, with the specified exception. No provision is made for issuing the writ, any more than for the form and action of it; because that being a creature of the common law, explained, defined, and governed only by that law, and constitutionally adopted from it, it was necessarily recognized in its common-law nature and character, and was demandable of common right by every man entitled to the protection of the government, wherever "justice was established" and legally administered. Can it be true, then, that the "judicial power of the United States," when properly organized, has no authority to issue this writ, unless a special statute confers it? On the contrary, is it not true that no court in which the Constitution vests that power could rightfully refuse the writ in a proper case, unless it was under a special constitutional restraint?

§ 470. An idea of the importance of this con-

stitutional adoption of the writ of *habeas corpus* is to be reached only by a consideration of the nature and purposes of the writ, and the right which it guards and protects. It is called in the English law, where it originated, *habeas corpus ad subjiciendum;* and its object and office is to bring the applicant for it, who may be "*any person*" under personal restraint, before a competent tribunal, to inquire into the cause of his restraint or detention, and to deliver or discharge him in case no legal cause is shown, or to adapt the restraint to the cause, so far as law and justice may be found to require. It presupposes and recognizes the actual right, *prima facie*, of every subject of the government to the personal enjoyment of "the blessings of liberty," and of course the universal right to the writ. This constitutional adoption of the writ, and recognition of the right it protects, is one of the means used for the attainment of that great and fundamental purpose and duty of the government, "to secure the blessings of liberty to ourselves and our posterity."

§ 471. The right to this writ operates as a restraint on power. It remains to inquire, in regard to the excepted "cases," when, why, and by whom the restraint may be removed, and power left without this restraint, — *when* rebellion or invasion require it for the public safety. *Why*, — because they require it for that purpose. *By whom*, — by those responsible for the

public safety. *How*, — temporarily, by suspension only; and not permanently, by repeal or otherwise. Rebellion and invasion are internal war; and as Congress may declare war, and "provide for the common defence," beforehand or afterwards, by any means in the power of the nation, they may doubtless use this as one, if they judge it to be required.

§ 472. The executive also, who must conduct and carry on the war, is responsible for its successful issue, to the extent of the faithful and efficient use of all the powers vested in him by the Constitution, by martial law, by the usages of civilized warfare, — which are a part of the law of nations, and of course of the Constitution, — and by all other laws of the land. As to what are the rights and usages of war, or what is authorized by the laws of war, in the case of internal war, the people of the United States had, before the late rebellion, the benefit of some schooling.[1] They have learned, not only that the *habeas corpus* might be suspended by military authority in times of invasion, but that the judge himself who issued it might be suspended also. This important lesson in martial law was taught practically, learned experimentally, and accepted and approved deliberately and thoroughly, by the whole government and people of the nation. Similar views of the executive or military power, in the time of internal war,

[1] Proceedings of General Jackson at New Orleans in 1815.

have since been practised upon, and deliberately sanctioned by law in the Habeas-Corpus Act of March, 1863. It is safe to presume, that the civil rights of individuals, however protected behind bulwarks and barricades of words, standing in the way of military power, backed up by the peremptory demands of the public safety, will always be swept away as with a besom, as they always have been. "Inter arma leges silent," — that is, all laws, except the law martial, and so much of the civil law as it may comport with the paramount purposes of those controlling the military authority to tolerate.

§ 473. 6th, "No bill of attainder or *ex post facto* law shall be passed." A bill of attainder, by the common law, as our fathers imported it from England and practised it themselves, before the adoption of the Constitution, was an act of sovereign power, in the form of a special statute of the *omnipotent* British Parliament, or those who claimed to be their successors in this country, by which a man was pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment *per legem terræ*. Such was its length and breadth. Accordingly the Supreme Court of the United States[1] say, and the saying is afterwards fully approved by Judge Story and Chancellor Kent, that "a bill of attainder may affect the life of an individual, or may confiscate

[1] 6 Cr. Rep., in the case of Fletcher *v.* Peck.

his property, or may do both." They might have added, that it may affect his liberty also, as well as his other rights; and that it may be made to apply to any number of individuals, or to a class of persons, by definite description and identification, as well as to a single individual by name.

§ 474. Such was the bill of attainder originally in England, and such was it in this country at the time of the adoption of the Constitution. By that the whole subject was abolished and prohibited entirely and for ever. Modern refinement has introduced some distinctions into the English law, which were never adopted here either by our common law or by our Constitution. A bill of attainder now in England strictly includes only cases punished with death, and consequent corruption of blood and confiscation of estate. Similar bills only prescribing less punishment are called by another name, — bills of pains and penalties.

§ 475. But the distinction was never adopted or recognized in this country while either were allowed. Both were included under the more ancient name. The gist of the Act is deprivation of rights by statute or legislative decree, rather than by due process and judgment of law. The rights affected may be life, liberty, property, and reputation; all or either. If it convicts of crime only, without further punishment; or if it takes away life, liberty, or property only, without imputing crime, — it is still of the same character,

and falls into the same class and under the same condemnation.

§ 476. They are all arbitrary and despotic in their nature, violative of the essential principles of justice and right, and in direct opposition to, at least, three other distinct and express provisions of our Constitution. 1st, The legislative power or right to say what the law shall be, is given to Congress. This is the only power, relative to this subject, vested in that department. Bills of attainder are acts of despotic and unlimited power, not acts of legislation. Legislation may prescribe the mode in which certain vested private rights may become divested. But the right and duty of applying this law to particular persons and cases as they arise, and executing it, appertains to other departments. To take away private rights is not the exercise of legislative power. 2d, These acts are all *ex post facto* in their nature, criminal or penal in their character, and founded on past transactions, and growing out of or connected with past considerations; and, 3d, They deprive a man of life, liberty, property, and character, either or all of them, without due process of law, and without trial and judgment *per legem terræ*, or according to the general laws of the land.

§ 477. *Ex post facto* laws have generally been considered to be such only as render an act punishable in a manner different and more unfavorable to the criminal, than it was when com-

mitted, and to be restricted to criminal and penal matters; while retrospective laws relate exclusively to civil matters. It may be found necessary to reconsider this distinction. Civil and criminal relate rather to the form in which the act is dealt with, than to the nature and character of the act itself. The same offence may be dealt with in either form or both; and that whether it was in itself a violation of natural or moral law, or only in violation of municipal law, or, as the lawyers say, *malum per se*, or merely *malum prohibitum*. It may be punishable, corporeally or pecuniarily, by indictment or information by the public prosecutor, or only in damages by way of personal remuneration at the private suit of the injured party.

§ 478. In such a case, a law made after the offence, requiring the court to double or triple the fine or imprisonment authorized at the time the act was committed, would be no more unjust than one requiring the jury to assess double or triple the actual damages allowable at the same time. Neither reasons nor authorities are wanting for the opinion that this constitutional prohibition ought not to be construed as applicable solely to criminal cases.[1] If a legislature should undertake to enact that A. B. should be deprived of his liberty, and become and remain the slave of C. D. for life, without any imputation or

[1] See 2 Peters' Rep., 416, 681; 4 Wheat. Rep., 578; 3 Story's Com., 212.

attainder of crime, but only because A. B. was born with a black skin and C. D. with a white one, it would seem to be difficult to find a sound reason why such a statute was not void, both as a bill of attainder and an *ex post facto* law, though it said not one word about either crimes or punishments.

§ 479. In the 3d section of Article III. there is another restrictive clause in regard to attainder. It is in these words, "Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted." This authority, or at least the exercise of it, indirectly repeals or annuls any existing punishment of treason, whether by the common law or any other law; and treason could not be punished otherwise than as Congress declared what the punishment should be. It may, of course, be any thing that Congress choose to prescribe, — death, attainder, corruption of blood, forfeiture, or any other. What, then, is the restriction? Just this: that if the punishment is, in the whole or in part, attainder, which it cannot be without an act of Congress, it shall not include or carry with it, shall not "work corruption of blood or forfeiture, except during the life of the person attainted." It operates directly on the meaning or definition of attainder, and not on the power of Congress.

§ 480. What, then, is attainder, without the

constitutional limitation, — that is, a judicial attainder, by judgment of law, after a legal trial and conviction, as a punishment? For we have seen, that no legislative attainder, or attainder by legislative act, can be enacted for treason or any other crime, and of course not without a crime. Here we are sent directly to the common law; for "attainder" is a common-law term, existing nowhere else, and having no meaning independent of the common law. A judicial attainder, and we can have no other, is, by the common law, no part of the judgment. On conviction of any crime of which death is the penalty, that is the end of the judgment; but the effect of that judgment, the "inseparable consequence," is attainder, — *attinctus*, attaint, stain, soil, disgrace, — and includes many important disabilities; among others, the "forfeiture of estate and corruption of blood."[1]

§ 481. By this provision, the judgment of death, as a punishment for treason, cannot be passed unless it is prescribed by Congress; and, if it is so, it cannot be attended with any of these consequences, as incident to it, though not embraced in it; in the language of our Constitution, as *worked* by it. Another punishment shall not be added to it, as an incident or an "inevitable consequence," by construction; especially no "corruption of blood or forfeiture," after the traitor is dead. "Except during the life" is exactly

[1] 4 Bl. Com., 380.

equivalent to "not after the death." So that, by this clause of the Constitution, the common-law punishment of treason, if there was or could be any such under our government, was not only implicitly annulled by giving the whole power of punishment to Congress, but the legal meaning of the common-law terms of punishment was so altered, that, if Congress intended to punish by any or all the common-law means, they must do it directly and expressly, and cannot accomplish it by construction, as a mere incident or consequence of the punishment of death.

§ 482. Even if corruption of blood and forfeiture of estate are expressly enacted, they cannot be made to apply to anybody but the traitor himself, and so cannot punish his innocent posterity after he is dead. In perfect accordance with this, though going somewhat beyond it, the statute of 1790 provides "that no conviction or judgment, for any of the offences aforesaid [of which treason is one], shall work corruption of blood, or any forfeiture of estate;" saying nothing about attainder, or the life of the party. But Congress have, in many instances, punished offences, and treason among the rest, by confiscation of estate, in whole or in part, as well as by fine, covering the full value of the whole, which substantially amounts to the same thing. Forfeiture can affect nothing but what was his own during his life; and corruption of blood cannot extend beyond his death, so as to inter-

fere with any right of inheritance that has to be traced through him. This remedied two evils of the English law: 1st, The conviction of persons after they were dead, for the purpose of forfeiting their estates in the hands of their heirs; and, 2d, The corruption of blood after death, that would prevent a descendant from inheriting, from a remote ancestor, an estate which would have gone to the traitor, had he been living.

§ 483. 7th, "No money shall be drawn from the treasury, but in consequence of appropriations made by law." As Congress must make the law, they only can make the appropriations; and, as the authority to make appropriations is not limited to any particular purposes and uses, it necessarily extends to all the purposes for which Congress may legislate, and for which the Constitution was ordained and established. Particularly does it extend to all the purposes for which taxes may be laid and collected, or money borrowed and debts contracted on the credit of the United States. They may unquestionably, in the language of the Constitution, "pay the debts, and provide for the common defence and general welfare, of the United States," if any combination of words in the language could give them that authority. These include, and are an epitome of, all the objects for which the government exists. The only thing indispensably necessary to sustain the right or power of Congress

to make any appropriation whatever, would seem to be, that they should persuade themselves that it has a tendency to promote or advance the Union, justice, tranquillity, safety, welfare, or liberty of the people of the United States. If any thing can be devised having a more remote bearing in favor of these important constitutional objects than some of the measures heretofore adopted and pursued under the auspices of strict constructionists, it might be useful to have them pointed out, so that they may serve as land-marks on this branch of governmental authority.

§ 484. 8th, "No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State." This government cannot confer a title of nobility, neither by Congress nor any or all the departments; and no officer of the government can accept of one, or of any thing else, without leave of Congress, from any foreign government.

§ 485. 9th, By Article IV., section 3, "No new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress." This restrains Congress from

dividing or amalgamating States. But it cannot apply to places in rebellion; to people who have made themselves public enemies, and thereby lost all their rights under the Constitution; to places where there is no government organized under the Constitution, administered in subordination to it, and recognized as a State government by the United States. Such places and such people, within the jurisdiction of the United States, are subject to the government of the United States only, and without the power of making any other, without their consent. The Constitution of the United States is "adequate to all the exigencies of government;" and they may be governed by it, as other places and people having no State governments are governed by it,—with their present divisions, or new ones, or none, at the election of the government. This is the position in which they have placed themselves, and they have nobody else to complain of.

§ 486. 10th, The fifth Article contains two restrictions on the power of amendment: "That no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the 9th section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate." The first has long since expired by its own limitation, and become obsolete; no practical question having ever been raised upon

it. The other is perpetual in its terms, and has hitherto proved effectual in its action. But its strictly legal operation has never been discussed or questioned. These are the only instances in which the Constitution has attempted to place any of its provisions beyond the power of amendment.

11th, "No religious test shall ever be required as a qualification for any office or public trust under the United States." This requires no remark, and the restrictions in the Amendments have been considered under that head.

CHAPTER XXVII.

THE EXECUTIVE.

§ 487. By Article II., "The executive power shall be vested in a President of the United States." This declares the essential and perfect unity of the executive department. Whatever shall be found to constitute "executive power" belongs to the President. "Shall be vested," in the language of the Constitution, means is vested. "All legislative powers,". . . "the executive power,". . . and "the judicial power,". . . "shall be vested" respectively in their appropriate departments. Not that any other or further act is necessary to vest them, but they are hereby vested *ipso facto*. In this sentence, the nature of the power is no otherwise defined than by its name; but it is obvious from that only, that the "executive power" can be nothing but the executive power of the government, which must mean the power to execute the Constitution and all the laws made under it.

"The object of this department is the execution of the law."[1]

THE PRESIDENT.

§ 488. The President is to be chosen by electors, of whom each State is entitled to a number equal to the whole number of its Senators and Representatives, to be designated in such manner as the legislature thereof may direct. This has, in a few instances, been considered equivalent to an authority in the State legislature to appoint them themselves; and such an appointment has never been rejected as unconstitutional. But as Congress is expressly authorized to "determine the time of choosing the electors," a phrase almost exclusively appropriated to a popular election, "and the day on which they shall give their votes," the choice has generally been referred to the people; and this may now be considered to be the established custom, if not the constitutional requisition. The Constitution prescribes no qualifications for an elector, but that he shall not be a member of Congress, or hold any office under the government.

§ 489. The electors shall meet and vote by ballot, in their respective States, on the same day in every State; sign, certify, seal up, direct to the President of the Senate, and transmit to the seat of the government of the United States, a

[1] 1 Kent's Com., 253.

list of all the persons voted for as President, and the number of votes for each. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates; and the votes shall then be counted. If any person have a majority of the whole number of electors appointed, he shall be the President for the term of four years from the fourth day of March then next. If no person have such majority, then from the persons, not exceeding three, having the highest numbers, the House of Representatives shall, by ballot, immediately choose the President; but the vote shall be taken by States, each State having one vote. A quorum for the purpose shall be one or more members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. If a President shall not be chosen before the fourth day of the next March, the Vice-President shall act as President, as in case of the death, or other constitutional disability, of the President.

§ 490. In the year 1865, when certain States were in rebellion against the government, not represented in Congress, and having no State governments regularly organized and administered in conformity to the Constitution of the United States, and in obedience to its laws, Congress, by concurrent resolution, directed that no certificates of votes from those States should be opened, or votes counted, in their presence;

thereby deciding that the people inhabiting those States had no right to participate in the election: which, as each State is entitled to as many votes for President as of Senators and Representatives in Congress, amounts to a decision that States so situated are not States at all, and are not entitled to any of the rights and privileges of States in this Union.

§ 491. The President shall receive a compensation for his services, which shall not be increased or diminished during the period for which he shall have been elected, and shall not receive any other emolument from the United States, or any of them. He must be a natural-born citizen, at least thirty-five years of age, have resided fourteen years within the United States, and take the required oath faithfully to execute the duties of the office.

§ 492. The Vice-President shall have the same qualifications, be chosen by the same electors, at the same time, in the same manner, and for the same term, — no elector voting for candidates for both offices belonging to his own State. If no person shall have a majority of the votes of the whole number of electors appointed, the Senate shall choose the Vice-President from those persons having the two highest numbers; a quorum for the purpose being two-thirds of the whole number of Senators, and a majority of the whole number necessary for a choice. These proportions are understood to refer to the

number of Senators actually admitted and sworn into the Senate, as constituted at the time. The Vice-President has no official duty to perform, except to preside in the Senate,[1] unless in case of the removal, death, resignation, or inability of the President, when that office and its duties devolve on him.

§ 493. "The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."[2] — "The House of Representatives . . . shall have the sole power of impeachment," and "the Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States;[3]

[1] The Constitution places a man in the chair of the Senate who is not a member; and, when the appointment of a presiding officer devolves on them, there is no constitutional objection to their doing the same, any more than there is to their appointing the other officers of the Senate in the same manner.

[2] Section 4, Article II.; and by sections 2 and 3, Article I.

[3] "*Shall not extend further*" does not mean shall not *exceed* or *fall short*, but be exactly *removal* and *disqualification*, and nothing else; because the 4th section prescribes only the first half as the punishment of

but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." By section 2, Article II., the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment;" and by Article III., section 2, "The trial of all crimes, except in cases of impeachment, shall be by jury." These are the only instances in which impeachments are mentioned or alluded to in the Constitution.

§ 494. By these it appears, — 1. Affirmatively, that civil officers, including the President and

civil officers, when convicted of a certain class of crimes or misdemeanors. For these or any other classes of offences, the punishment may or may not be disqualification; and for other officers or persons than civil officers, the punishment may or may not include removal. It "shall not extend further" than both, in any case; but must it "extend" so far as either, in every case? It must extend to removal in the case of "civil officers" convicted of the offences mentioned in section 4. But the Constitution does not say it shall "extend" to either, in any other case. Persons or officers, other than civil officers, may be convicted of petit crimes or misdemeanors, or official or personal delinquencies and improprieties, worthy or not of either of those punishments. If so, what punishment is the Senate authorized to inflict; or, in other words, what punishments do "not extend further" than removal and disqualification for office, absolute and perpetual? Certainly either alone is less than both; and either, with limitation as to time, prerogatives, perquisites, &c, is less than the whole without limitation. Though the same in kind, it may be less in degree, and so "not extend further." But how is it with punishments different in kind? Deprivation of other rights, privileges, and immunities, natural, civil, or political. Are any, and which, of these less, and so would not exceed or "extend further," than deprivation of the right to an office, in existence or in expectancy? We have no experience to give answer to these questions. When private individuals are convicted of treason or other high crimes, and civil officers of delinquencies not amounting to high crimes or misdemeanors, we shall see if any different punishments may be inflicted not exceeding those named in the Constitution.

Vice-President, may be impeached for treason, bribery, or other high crimes and misdemeanors; and, if convicted, *shall* be removed from office, and *may* be disqualified for any office under the government. 2. It does not appear, negatively, that they may not be impeached for other and lesser offences, and punished in the same manner, or otherwise not exceeding that. 3. The general power of impeachment and trial may extend to others besides civil officers, as military or naval officers, or even persons not in office, and to other offences than those expressly requiring a judgment of removal from office; and the punishment may be the same, with the exception of removal, when the offender is not an officer. 4. A pardon, before or after conviction, could not affect the punishment, whether it were removal, disqualification, or any thing less, and whether the offence were a high crime at law, or merely some misfeasance or non-feasance in office. 5. Whatever may be the offence or the punishment on impeachment, or whoever may be the party, his responsibleness to the law of the land, in due course of its ordinary administration, is not interfered with.

§ 495. It was the opinion of the framers and early administrators of our government, that all the civil officers were impeachable for minor malfeasances in office, not amounting to high crimes or misdemeanors at law, and punishable in any manner not exceeding removal from, and dis-

qualification for, office. In the great debate on the President's power of removal from office, in the first Congress, Mr. Madison said, "He will be impeachable by this House, before the Senate, for such an act of maladministration: the wanton removal of meritorious officers would subject him to impeachment and removal from his high trust."[1] Judge Chase was nominally impeached "for high crimes and misdemeanors," though the articles of impeachment specified only certain acts of questionable judicial propriety, not amounting in law to any crime, high or low.

§ 496. Judge Pickering was convicted and removed on charges, in this respect, of a similar character; though he was absent and insane, and answered neither by himself nor counsel. In the case of Senator Blount, he was sufficiently charged with the crime of bribery; but he was not tried, for the Senate expelled him, on their own motion. There is nothing in the Constitution that asserts or implies that persons, whether in office or not, may not be impeached for crimes, or for minor malfeasances or non-feasances, not amounting to any offence, for which officers *must* be removed, and punished on conviction, within the limits allowed in section 3 of the first Article. No such principle has been settled in practice. If private citizens may be impeached and convicted of treason or other crime or mis-

[1] 1 Lloyd's Debates, 503, 351, 450; 4 Elliot's Debates, 141.

demeanor, they may be punished in the same manner.

HIS POWERS.

§ 497. "The executive power" of the government, *ex vi termini*, includes the aggregate of all the agencies requisite in the execution of the whole law. As the department is a unit, and deposited in a single hand, with the duty to "take care that the laws be faithfully executed," he would be legally competent, and actually authorized, to execute in person any portion of it he pleased. It being physically impossible for him personally to execute the whole, justice would require, that, in the performance of the residue for which he was responsible, he should have the appointment and control of his own agents. But the Constitution interferes with this adjustment of duties. The President himself is subject to law, and only bound to fulfil his duties according to law. The law regulates the appointment and duties of his subordinates, and relieves the weight of his own responsibleness accordingly.

§ 498. The law-making, the law-construing and applying, and the law-executing powers are co-ordinate and co-extensive, each embracing all of its kind necessary and proper for the administration of the government, and all granted by the Constitution. If they are not precisely and definitely bounded, they are well distinguished

and understood in their general outlines, and more exactly defined by occasional landmarks, placing particular matters on one side or the other of the divisional line. For the purpose of performing all the duties of his department, the President is not only the chief magistrate, but the commander-in-chief of the army, navy, and militia, when in service, embracing all the physical power of the nation, which must be applied to the protection and administration of government and law. But he must execute the law as it is written.

§ 499. Simply as the executive, he can make no law, and dispense with no law; neither make peace nor remit penalties. Hence explanations, qualifications, and limitations are necessary. The powers, being limited by law, must be executed according to law.[1] The power of declaring war is vested in Congress; but this can only apply to such war as is at the option of the government. It cannot apply to such cases of aggression as the President, or even a subordinate officer, is bound to resist, and which becomes war by such resistance. While it takes two parties to make a war, war may exist, both in fact and in law, though it should be lawfully declared by one party only, or even by neither. Such a war will be speedily adopted by Congress, as in the case of the Mexican war of 1846 and the great civil war of 1861; not neces-

[1] Brown *v.* United States, 8 Cr. Rep., 110, 147.

sarily by being declared, but by being recognized and acted upon, as the existing *status* of the country. "War . . . begins from the mutual use of force."[1] This doctrine is abundantly sustained by the Supreme Court in the prize cases reported 2 Black's R., as well as by all the other authorities on international law; and it is logically reasoned out in Trumbull's "McFingal," thus:—

> "For that's no war, each mortal knows,
> Where one side only gives the blows,
> And th' other bears 'em."
>
> "But when you shot, and not before,
> It then commenced a real war."

§ 500. When the state of war legally exists, it is the law of the land, which the President is bound to execute. He has a discretion as to the manner and extent, within the rules of civilized warfare established by the law of nations, limited, however, in both respects by the expressed will of the legislature."[2] The legislature might perhaps, with the consent of the adverse party, terminate it by repealing the declaration, and withholding the means of prosecuting it. But the executive, as such, can have no power to terminate it, without a direct violation of his official oath to execute the law. By his participation with Congress in the legislative power, and with the Senate in the treaty-making power, he may have a voice in the matter; but, simply as the executive, he has no power or duty but

[1] Bynkershoek. [2] Brown *v.* United States, *ubi sup.*

to prosecute it to the end, agreeably to such laws as are or may be made for the purpose.

§ 501. All his duties, with respect to the enemy, are not only executory, but they are military and belligerent, arising out of the state of war. As commander-in-chief, he may make a truce, or partial cessation of hostilities; so may a subordinate commander, from the nature of his trust. But a general suspension of hostilities throughout the nation, more especially for a length of time, must be made by the sovereign or supreme legislative power of the nation.[1] War can only be terminated by peace. An abandonment of the war, or a subjugation of the enemy, is not necessarily peace. This requires two parties as much as the war. A subdued enemy may be held in continued subjugation; but such holding, while it continues, is perpetual war.

§ 502. By virtue of his military command, he must govern them, and may govern them, by martial law, under such forms of civil and municipal regulation as he pleases, until the supreme legislature, or the treaty-making power, shall give them peace or civil administration, in such manner as their circumstances shall seem to them to demand and warrant. But his military government, as well as his civil, is only executory. He governs as the executive, to give

[1] Vattel, b. 3, c. 16, section 238; Grotius, b. 3, c. 21; 1 Kent's Com., 149.

effect to actual law. If the legislative authority does not give a more appropriate and precisely adapted law for the case, he must conform to such general provisions of constitutional and international law as may be found suited to the exigency. In that case, he may undoubtedly govern a subdued enemy, either directly, by his own arbitrary but just will, or through such forms of voluntary self-government as he may choose to permit, and they to practise, — always subject to his military supervision and approval.

§ 503. He can, however, confer on them no rights beyond those of belligerent enemies, and absolute submission to his own military jurisdiction. If he undertakes to proclaim peace, abandons his military supervision, and remits them to the independent election and administration of such civil and political regulations and institutions as they may have formerly practised, or may thereafter adopt, he not only violates his trust, and abandons his official duty, but he usurps the sovereignty and authority of the nation which in no sense belong to him, and which only are adequate to confer peace and political rights on such a people. But, even if they could have peace, having no lawful civil government within the Union, and no right to create one, they would be exclusively under the Constitution and laws of the United States. These, as the executive and the only civil magistrate, he would be bound to execute and administer, as

they stood, in the most effectual manner he could under the circumstances, till the law-making power should furnish the needful additions. He could make no new laws, nor authorize others to make them, or administer them if they were made, any more than he could do the same things for the rest of the national domain.

§ 504. It was in this manner that New Mexico and California were governed, both before and after peace had confirmed our title to them, until Congress gave them a different government. It was in the same way that the rebel States were ostensibly governed, for a long time after the surrender of their armies, and until the neglect of Congress and the prevalence of evil counsels in the executive had induced the withdrawal of appropriate military control over them, and left them, in the hands of rebels, to the anarchy, disorder, and injustice, which their own rebellious and unconstitutional agencies during the war had substituted in the place of the regular constitutional governments of republican States within the Union. These they had cast off and abolished, and now attempted to resort to with no other profession of subordination to the general government than they considered absolutely necessary to enable them to participate in it, and in due time again to essay its management and destruction.

§ 505. The authority of the nation over them was perfect, as well by reason of their original

position as a component part of the United States, as by the result of the war. The Constitution was "ordained and established for the United States, — the whole land constituting the national domain; and was 'adequate to all the exigencies of the government' thereof," — all the exigencies of an entire and good government. Congress had the same "power to make all laws necessary and proper" to execute the Constitution over them, as over the rest of the country; to govern through the instrumentality of State organizations, where there were any legally constituted; and to govern exclusively of such organizations where there were none. They had the same exclusive jurisdiction over them that they had over the district of Columbia, the Territories, and all other places within the national domain where State governments were excluded, or where, for any cause, none existed.

§ 506. They had the same right to organize republican governments for them, and permit them, so far as they deemed it safe, to govern themselves thereby, and to re-admit them to all the rights and privileges of "States in the Union," which they had cast off and rejected, as they had to perform a similar operation in the Territories. It was the failure of Congress in these respects that gave the President the right, and imposed on him the duty, of continuing to govern them by martial law; and enabled him,

by the neglect of that right and the violation of that duty, not to govern them at all, but to leave them, in destitution of any suitable external control, to do what mischief they pleased to each other, and to the rest of the good people of the United States.[1]

[1] Since this work went to the press, Congress have passed, by more than a two-thirds vote of both Houses, "An Act to provide a more efficient government for the rebel States;" which has (March 2) become a law, notwithstanding the President's veto.

It recites, that "no legal State governments . . . now exist in the rebel States," and that some government is "necessary . . . until loyal and republican governments can be legally established;" and enacts that they "be divided into five military districts, . . . subject to the military authority of the United States." That each district shall be assigned to a general officer of the army, with "a sufficient military force to enable him . . . to enforce his authority." That it shall be his duty . . . to protect all persons in their rights; . . . to suppress insurrection, disorder, and violence; . . . to punish disturbers of the peace and criminals." He may allow "local civil tribunals," or "organize military commissions or tribunals for that purpose;" and all State "interference . . . shall be null and void." No military sentence affecting life or liberty shall be executed without the approval of the officer in command; and no sentence of death, without that of the President. "When the people of any one of said rebel States shall have formed a government in conformity with the Constitution of the United States, . . . framed by delegates elected by the male citizens of said State, twenty-one years old or upwards, of whatever race, color, or previous condition," except disfranchised rebels and felons; their constitution providing "that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates; and when such constitution shall be ratified by a majority of the persons voting on the question,". . . and been submitted to Congress and approved; and when said State, by vote of its legislature elected under said constitution, shall have adopted the fourteenth Amendment," and it "shall have become a part of the constitution,"—then said State may be represented in Congress, and the first four sections of this Act become inoperative: provided that no person excluded from office by the fourteenth Amendment shall be a delegate for forming such State constitution, or vote in the choice of a delegate. That, until the people shall be admitted to representation in Congress, any civil government therein shall be provisional only, "and shall be in all respects subject to the paramount authority of the United States." In all elections under

§ 507. "He shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."[1] This power is general and unqualified, reaching all offences, and including the remission of fines, penalties, and forfeitures, with a single exception. It may be exercised before or after conviction, and absolutely or conditionally; and no law can abridge his right in this respect. If this is not stated too broadly, it may still be hoped, that, so far at least as respects some of the incidents and effects of a pardon, means may be found, under some circumstances, to curtail them by law. The legal effect of the exercise of the king's prerogative of pardon was always regulated and controlled by Act of Parliament.

§ 508. The exception of cases of impeachment undoubtedly prevents the interference of the President with any trials or punishments by impeachment; but it is to be remembered, that all such offences are liable to be dealt with at law, like other similar offences, and may not in this respect be excluded from the benefit of a pardon. But as an impeachment cannot prevent a pardon, so neither can a pardon prevent an impeachment; and whatever punishment on impeachment may be lawful, cannot be remitted or pardoned by the executive. This renders it

the provisional governments, the same persons only shall be voters as above provided; and no person shall be eligible to any office who is ineligible by the fourteenth Amendment.

[1] Article II., section 2.

important to consider who may be liable to impeachments, and for what; and what may be the punishments that do "not extend further" than to removal and disqualification for office.

§ 509. The right to punish for contempts, not being mentioned in the Constitution, has been supposed to arise to all legislative and judicial bodies, by implication, and from absolute necessity. As any external control over it might limit or destroy its efficacy, it has been inferred that the same implication must, from the same necessity, exclude the pardoning power from this class of offenders.[1]

§ 510. "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."[2] A treaty is in the nature of a law, and it should seem, on general principles, might be made by any power competent to give the law on the subject to which it relates. It differs from an ordinary law, by being international in its character, affecting the interests and requiring the concurrence of independent States. If it should be in the form of a statute, conditioned on its adoption, in proper form, by another State, and the condition satisfactorily performed, its operation on the citizens and subjects of the first State, within its own jurisdiction, would

[1] 6 Wheat. Rep., 204; Anderson v. Dunn; Rawle on Constitution, chap. xvii., p. 177; 3 Story's Com., 358.

[2] Article II., section 2.

hardly be distinguishable from that of an ordinary act of legislation on the same subject. Not only so, but our Constitution makes it expressly "the supreme law of the land," when "made under the authority of the United States," by whomsoever that authority may be exercised.

§ 511. Instances are not wanting, under our government, where treaties have been made by the legislative power only, a simple majority of a quorum of both Houses of Congress, with the approval of the President. Perhaps the most notable instance of this was the Act of Congress of March 1, 1835, making certain propositions to the then independent State of Texas, by the acceptance of which, on her part, she merged herself in the United States, and became a component part of the nation, and a State in the Union. This was substantially a treaty between two independent nations, made, at least so far as the United States were concerned, by the legislative power exclusively, and by small majorities, when it probably could not have been made by the constitutional majority in the ordinary mode, —by the President and Senate.

§ 512. Peace can be made by the legislative power, in time of war, with the concurrence of the adverse belligerent, by prohibiting the prosecution of the war; which would amount to a treaty. Instances of reciprocal provisions for commercial purposes, made and carried out between independent States, by separate legislation,

dependent on their being mutually adopted and executed, are substantially treaties made, if not wholly negotiated, by the legislative power. But the extent to which it may be competent for the supreme legislature to exercise a treaty-making power need not now be considered, though a limit short of the full extent of constitutional legislation is not readily perceived. International engagements entered into in this manner may be considered more emphatically exposed to the fluctuations of legislative opinion, than the more formal pledges of national faith usually adopted in treaties negotiated and exchanged by the executive authority. This idea might affect arrangements looking to performance *in futuro*, but could have no effect on stipulations executing themselves *in presenti*.

§ 513. However this may be, there can be no question of the right of the American people to give a similar authority to any other set of officers or agents they please. In this instance, and by this 2d section, they have expressly given a "power . . . to make treaties" to the President and Senate; and they might in the same, or in an additional section, have given a similar power to other functionaries. In neither case would the power thus granted detract from the general legislative power of Congress, whatever that may be, unless it should be made in terms, or by necessary implication, exclusive, which would directly negative the legislative power to do the

same thing. As the Constitution stands, no inconvenience is to be apprehended in the making of treaties. Both modes require the approbation of the President and Senate; while the legislative mode would substitute a majority of the House of Representatives for the enlarged majority of the Senate, and a two-thirds vote of both Houses for the approbation of the President. The two, in the alternative, would seem to furnish desirable safeguards for the public interest, against precipitation on the one hand, and factious opposition on the other.

§ 514. Treaties being international, and requiring two parties, a general authority to make them must necessarily extend to and include the regulation of all subjects requiring, or adapted to, that mode of adjustment. "The power . . . embraces all sorts of treaties, — for peace or war, for commerce or territory, for alliance or succors, for indemnity for injuries or payment of debts, for recognition and enforcement of principles of public law, and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other."[1] All these subjects, being matters of national concern, are of course not less within the purview of a legislative power, embracing the safety, welfare, and liberty of the people, than of the treaty-making power. When made, they are the supreme law, and equally binding on the

[1] 3 Story's Com., 355; 5 Marshall's Washington, 650.

people and on the government in all its branches. This point, though formerly disputed, is not now considered a debatable question.[1]

§ 515. "He may, on extraordinary occasions, convene both Houses or either of them; and, in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers." As he may receive, so he may refuse to receive; or, in other words, reject them. He is the only organ of communication with foreign nations. Thus we see, that, besides what would necessarily fall within his exclusive and appropriate duty as the executive, to take care that all the laws are faithfully executed, the President has a few special powers expressly assigned to him in the Constitution, by particular and specific grants. We must next examine the qualifications and restrictions which circumscribe and limit what would otherwise fall within the appropriate sphere of executive duty.

§ 516. Making and executing the law would, in their broadest signification, cover the whole business of government. But our Constitution, following the publicists and jurists, has instituted a third department, devoted mainly to construing the general rules of the law, in their application to the special circumstances of its subjects, and directing the manner of their

[1] 1 Kent's Com., 267.

execution. The duties of this department are intermediate between the other two, and impinge somewhat upon both. How far they limit or qualify the right of either to adjust and apply the law to particular persons and cases, may be best seen in considering the judicial department. Another most important qualification of the executive power is the distribution which the Constitution has made of the power of appointment to office. All officers, whether civil or military, are executive officers; and we have seen that the selection and control of the agents by whom the laws are to be executed, would naturally result to the department exclusively responsible for their execution. But the Constitution has interfered with the power, and of course with the responsibility.

§ 517. 1. All offices must be established by law, before they can be filled. The Supreme Court is established by the Constitution; but that foreign ministers are, has been denied. If they are not, the executive is dependent upon the legislature for the ordinary means of executing one of his most undisputed prerogatives. 2. He may nominate only, and, with the advice and consent of the Senate, appoint all officers established by law, whose appointments are not otherwise provided for in the Constitution. 3. He may be invested, by law, with a power to appoint "inferior officers;" by which is probably meant officers inferior to, or at least other than,

the courts of law, heads of departments, and foreign ministers, who are the only others mentioned. 4. He has, by legislative construction or grant, the exclusive power of removal, which places at his control all officers appointed by himself, or others holding at his will. 5. He shall commission all the officers of the United States. 6. He can fill all vacancies that happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

§ 518. A vacancy is said to "happen," within the meaning of this section, when he removes the incumbent. If so, he may take the appointment of all the executive officers to himself, at any recess of the Senate; and, if no nominee of his is confirmed by the Senate during their next session, a vacancy will again "happen" on the adjournment of the Senate, which he may again fill in the same manner.

§ 519. This construction would place all the officers, not permanent by the Constitution, as entirely at the disposal of the President as if no qualification of the executive power had been attempted by the Constitution. Such a consummation would, of course, be totally at variance with the designs and purposes of the American people, by whom it was made. If freely used, by a bad man, for personal or party aggrandizement, such a power would be one of the most tremendous engines of mischief that can be con-

ceived under our government. What practical check upon such a use of the power is now in operation, is not perceived. Of those that might be applied, in case the necessity should arise, these three are the most obvious: —

1. To alter the legislative Acts which place the power of removal exclusively in the President.

2. To provide for the permanent session of the Senate.

3. To exercise the power of impeachment for malfeasance in office.*

* Since this work was sent to the press, the first of these alternatives has been adopted by Congress.

CHAPTER. XXVIII.

THE JUDICIARY.

§ 520. By Article III., the judicial department of the government is composed of "one Supreme Court, and such inferior courts as Congress may, from time to time, ordain and establish." A Supreme Court is ordained by the Constitution; and, by Article II., section 2, it is expressly required that the President "shall nominate, and by and with the advice of the Senate shall appoint, . . . judges of the Supreme Court." All other courts are inferior to the Supreme Court, and are such as Congress may see fit to create; and the judges are appointed in the same manner. "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

§ 521. Nevertheless, it has been held by Congress, that, where courts are established only by law, they may be abolished by a repeal of the

law; and thus the judges be deprived of their offices and of their compensation, notwithstanding the Constitution says the offices shall be held during good behavior, and the compensation not diminished while they are held. This construction has been followed in most of the States, in regard to such courts as were established by legislative Acts, and not by their constitutions. This department is co-ordinate with the other two. Whatsoever necessary and proper laws the first may make, and the second may take care to have faithfully executed, this department may administer judicially, in all cases legally brought before them.

THE JUDICIAL POWERS.

§ 522. The Constitution, after providing for the organization of the legislative and executive departments, vests in them, respectively, all the legislative and executive powers of the government; and proceeds to point out, in terms more or less general and particular, certain things that they may do, amounting summarily, as to the first, to power to make all laws necessary and proper for executing the Constitution; and, as to the second, to power to execute all laws so made, and all other laws of the land. So, in regard to this department, after having provided for its organization as above, it proceeds to vest in it the judicial power, in terms equally broad and comprehensive. "The judicial power of the

United States shall be vested" in its courts as above organized. These are the same words of investment that are used in regard to the other departments, and have never been understood to require an additional act of investment, and no authority is provided to perform such an act, but to be of themselves an actual investment; and they have always been so considered and acted upon, at least by both of the other departments in regard to themselves.[1]

§ 523. The whole duty of the courts expressly assigned in the Constitution is to exercise the judicial power; and they have no other. Consequently, the Constitution proceeds at once, in section 2, to describe and define the extent of that power. "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority." This is a broad and general statement of the judicial power of the government; and it will be seen in the sequel, that, like the general statement of the legislative power and of the executive power, it comprehends and covers all the items and particulars elsewhere mentioned in the Constitution, and a great deal more. "Judicial" relates to justice; and "judicial power" is to distribute and administer jus-

[1] By Article II., section 2, "The President *shall be* the commander-in-chief of the army and navy of the United States." Who shall make him so, if the Constitution does not? and who shall vest legislative, executive, or judicial power, if the Constitution does not?

tice, in judicial form, and is assigned to this department, in part execution of one of the great purposes of the Constitution, — "to establish justice."

§ 524. The form of instituting, bringing, entertaining, hearing, and deciding controverted cases, is defined and settled by the common law, as it was imported from England and other countries, used and approved here before the Constitution, often referred to by it, and twice expressly mentioned in it as furnishing the existing law, and rule of proceeding. What the power is which is judicial in its nature, judicial in the mode of its exercise, and judicial in the conclusiveness of its operation, is not told by the Constitution, and is nowhere to be learned but from the common law.

§ 525. "Shall extend to" means shall include, comprise, apply to, and provide for. "All cases in law and equity" are all suits, civil and criminal, involving controverted rights between party and party, and instituted in legal form of judicial proceedings. "Arising under this Constitution, the laws, . . . and treaties," &c., is "involving any question . . . under the Constitution, laws, or treaties of the United States."[1] Any question presented by the facts of a case, or growing out of those facts, arises under the Constitution, &c., when its solution depends upon the Constitution, &c., or when it is to be

[1] 8 Story's Com., 507.

decided, by ascertaining the true meaning and construction of any thing in the Constitution, laws, or treaties of the United States.

§ 526. Every such case, whether civil or criminal, belongs to the judicial power of the United States, which is vested ["shall be vested"] in the Supreme and other courts of the Union. Not that such question is actually in dispute between the parties, or is made a point in the case, or even that it is capable of being made a point in any case. It may be too plain ever to have been disputed; or it may have been too often adjudicated, or too long practised upon, ever to be disputed again. Nevertheless, if it is involved, "forms an ingredient,"[1] in the case, so that it might be raised, the case belongs to the judicial power of the United States.

§ 527. Thus, if the United States should bring an action of assumpsit against A. J., to recover damages for a breach of promise in neglecting to hang J. D., according to contract, *licet sæpius requisitus*, the case would obviously be within the "judicial power" of the government; because the right of the United States to sue in their own courts would be involved in it, and might be raised, argued, and decided under the Constitution and laws of the United States. Though the question is too clear to be made at all, though it has been practically decided and acquiesced in for near a century, and though it may probably

[1] Marshall, C.J., 9 Wheat., 738.

be the last question that counsel learned in the law would think of making in defence of the case; yet, as it would be involved, and might be disputed, and depends upon the Constitution and laws of the United States, the judicial power would clearly extend to it.

§ 528. In this first and general description of the power, no reference whatever is made to the character or residence of the parties, to the subject-matter of the controversy, to the origin of the right in dispute, or to the law on which the ultimate adjudication may depend. The parties may be citizens of the same State, of different States, or of no State at all; or they may be aliens, and not citizens. The subject-matter in dispute, the foundation of the right claimed, and the law on which the merits depend, are all alike immaterial, in respect to this general limitation of the judicial power. The merits of the case may depend upon domestic law or foreign law, local law or general law, statute law or common law, civil law or criminal law, municipal law or maritime law, the law of nations or the by-laws of a private corporation, the law of Turkey or the law of China.

§ 529. In relation to the jurisdiction under this clause, the only question is, whether the case presents, incidentally or otherwise, "any question arising under [depending upon, or to be decided by] the Constitution, laws, or treaties of the United States." If it does, it is within the

"judicial power of the United States," which is vested by the Constitution in its courts. These words, say the Court, in the case of Osborn *v.* the United-States Bank,[1] were "obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States, a trial in the federal courts."[2]

§ 530. And what, it may be pertinently asked, are those rights within the jurisdiction of the United States, civil, political, constitutional, legal, or even natural, so far as they are recognized by law, that are not claimed, held, and protected, under and by virtue of the Constitution of the United States, — the supreme law of the land? "Where is the Act that might not be connected with the Constitution or laws of the United States?"[3] If no such right can be found, then is the jurisdiction of this department commensurate with that of the government, of which it forms a co-ordinate portion; and the duty of the government to "establish justice" is as unlimited as the power of the people, who made and ordained it for that express purpose.

§ 531. Is the plaintiff a real or fictitious person? Has he a right to sue? Has he a right to come into this court? Is he a citizen, alien, friend or enemy, slave or free, inhabitant or

[1] 9 Wheat. Rep.

[2] See also Marbury *v.* Madison, 1 Cr. Rep.; Martin *v.* Hunter, 1 Wheat. Rep.; Cohens *v.* Virginia, 6 Wheat R.; and Gibbons *v.* Ogden, 9 Wheat. Rep.

[3] 1 Kent's Com., 319.

commorant for a day, under the protection of our government? Has he any rights under our Constitution? All this lies at the foundation of every case, and depends on the law of the United States. "The question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defence which the defendant may choose to set up. The right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves must determine its character, whether those questions be made in the case or not.[1]

§ 532. The 2d section then proceeds to mention particular classes of cases to which the judicial power extends, not by way of an addition to, or an enlargement of, the description before given, by the name of cases arising under this Constitution, &c.; but rather as instances or specimens of the kind of relation in which different classes of cases may stand to the Constitution, while yet they come within the judicial power, as arising under it. The first of these is, "to all cases affecting ambassadors, other public

[1] Opinion of the Court, per Marshall, C. J., in Osborn *v.* The Bank.

ministers, and consuls." These officers derive their rank, prerogatives, and immunities, from the Constitution and laws of the United States, the law of nations being a part thereof; and of course any question respecting them must arise under the same Constitution and laws. This would show them to be within the general description of the judicial power in the preceding clause, without being particularly named, as in this. It would not only include them personally, but all other persons and things that might affect them relatively; and this also must depend upon the same Constitution and laws.

§ 533. The next clause extends the judicial power "to all cases of admiralty and maritime jurisdiction." The admiralty and maritime jurisdiction depends upon the law of nations; and all the rights and duties coming within it, and which may become the occasion of controversies and cases for litigation in the courts, must arise under the Constitution, of which that law is a part, modified, as it may be, by other laws and treaties of the United States. This clause, of course, adds nothing to the judicial power over cases "arising under this Constitution," &c., as described in the first clause of this section.

§ 534. The next clause is "to controversies to which the United States shall be a party." Some criticism has been indulged on the change of phraseology here from "cases" to "controversies," the justice of which is not perceived.

Surely it cannot be pretended that the judicial power can reach any "controversy" till it becomes a "case" for litigation between party and party, according to the forms of law. A court or judicial tribunal can take no official notice of a "controversy" otherwise than in the form of a "case." The act that makes it a "case" brings it to the official notice of the court, and gives them jurisdiction to decide it, if it arises under the Constitution. The United States have no corporate existence, and no right or power to become a party in any case, but by virtue of the Constitution and laws. Of course every such case must "arise under this Constitution," and be within its "judicial power" independent of this clause.

§ 535. The last clause of the 2d section is "to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects." The term "foreign states," in this clause, means foreign nations, independent sovereign communities, co-ordinate and co-equal members, with the United States, of the great family of states or nations, under and by virtue of the law of nations. They are not dependent upon the United States, owe no allegiance to it, and no deference to our Constitution. They are

foreign, alien, outside, and independent of the United States.

§ 536. The word "States," used alone in the same clause, refers to and designates a different class of communities and political bodies of a totally different character, — not States by the law of nations, or members of the community of States and family of nations; but only States under and by virtue of the Constitution of the United States and within the Union, component parts of the nation, and dependent upon, and subject to, the Constitution and laws thereof. The States thus designated in the clause are States only in name and by virtue of the Constitution, being subdivisions of the national domain, and constituent portions of the country. They are subordinate parts of the whole body politic, and might just as appropriately have been called by another name, without any change of character.

§ 537. Such being the diverse character of the two different political bodies mentioned in the clause, it is obvious that no "controversy" or "case" can occur among them or their respective members, as such, that does not "arise under this Constitution, or the laws and treaties of the United States." Their respective rights, and even existence, as separate political agents, corporations, depend entirely upon the Constitution, and the law of nations, which is a part of it. No question concerning them, or their legal or

equitable rights, can be presented that does not directly involve and "arise under this Constitution." This principle was thoroughly examined and fully established in the case of Osborn *v.* the United-States Bank, before cited, where it was held by the Supreme Court, that the judicial power of the United States extended to cases brought by the Bank, by the Postmaster-General, &c., in consequence of their being constituted by, and owing their existence and all their rights as corporate bodies to the laws of the United States.

§ 538. The whole extent of the "judicial power" of the government is described in this 1st cl., 2d sect. of Art. 3. In the first and third instances, it is described by the character of the law out of which the case arises, and by which it may be decided; in which at least some part of the case is involved. In both instances, the law is that of the United States. In the other cases, it is described by the character of the parties litigant, without any reference to the laws, foreign or domestic, by which the decision may be governed. In these last cases, where the jurisdiction depends on the character of the parties, it will be noted, that the parties are indebted for their required character to the Constitution and laws of the United States. Consequently, this class is brought within the description of the other class, as "cases arising under the Constitution and laws," and may be

decided by the construction that shall be judicially put upon them.

§ 539. It will also be noted, that all the cases of the first class, depending on the character of the law, depend on the Constitution itself; because the laws and treaties of the United States owe all their authority to the Constitution, and the law of nations is expressly made a part of it. So that all the cases to which the judicial power of the United States applies are "cases arising under this Constitution;" and the other parts of the section are only exemplifications, reduplications, or explanations of the first and broad general description of the whole judicial power. In this respect it is like the terms in which the powers of the other departments are delegated; giving the general power of the department in terms broad enough to cover all the power of that sort belonging to the government, and then superadding certain particulars serving as landmarks, exemplifications, or specimens, showing the character of the department and the nature of its duties, as distinguished from the others. Thus the judicial department is co-equal and co-ordinate with the legislative and executive departments, construing and applying, "to all cases in law or equity," all the law the Constitution has made, or authorized to be made and executed, for effecting the objects for which the government itself was ordained and established.

§ 540. In cl. 2, sect. 2, art. 3, the Constitution assigns such portion of the judicial power, so vested in the department, as it deems expedient, to the Supreme Court, leaving all the rest to be exercised by "such inferior courts as Congress may, from time to time, ordain and establish." The portion assigned to the Supreme Court is under two heads, — original and appellate.

§ 541. 1st, *Original.* — "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction." "Shall have . . . jurisdiction" is peremptory; and the use of this language shows, that the judicial power, of which this is a part, had already been vested in the department. If the actual investment of it required any other agency, or any other act than had been performed, then this peremptory assignment of a portion of it to a particular court could not have been made till such act had been performed; for, otherwise, it could not be known that it ever would be performed, and so this peremptory assignment fail. "Shall be vested" can mean nothing else than is vested. It has been decided by the Court, that this "original jurisdiction" can neither be enlarged nor diminished: because, if enlarged, it would detract from the constitutional appellate jurisdiction; and, if diminished, it would so far deny all jurisdiction to the Supreme Court, which can take appellate jurisdiction only

in "other cases." It must also be exclusive; because, if a case of this kind can originate in any other court, this court, not being able to take appellate jurisdiction, could have no jurisdiction at all.

§ 542. 2d, *Appellate.* — The next sentence is, "In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." The cases of "original jurisdiction," and the "all other cases before mentioned," are all the cases to which the judicial power of the United States extends; and when it is said that the Supreme Court "shall have" original or appellate jurisdiction over the whole of them, it only reiterates what it had distinctly said in the first section of the Article, — that all the judicial power of the United States "shall be [is] vested" in its courts. The "appellate" portion, as well as the "original," is vested peremptorily, entirely, and irrevocably, but subject to "such exceptions, and under such regulations, as the Congress shall make."

§ 543. Congress, then, may "except" some cases out of the appellate jurisdiction of the Supreme Court. But this exception shows that without it the whole jurisdiction is vested, and the exception must be in favor of some other court of the United States; otherwise the cases excepted would be left unprovided for. They

cannot make an exception out of the judicial power of the United States; or, in other words, they cannot diminish, abandon, or relinquish any portion of the judicial power of the government as vested by the Constitution, any more than they can do the same to the executive power, or to their own.

§ 544. They once undertook to resolve, that they had no right "to interfere in the emancipation of slaves, or with their treatment in any of the States;" and, at another time, that they had no right to abolish slavery in the District of Columbia. But neither of these altered the Constitution. As soon as they had a disposition to do the last, they did it; and, if the disposition had been equally strong to do the first, they would, as they ought, have done that also. As it was not, the people did it for them.

§ 545. Their authority was the same in both cases. Congress can legislate only by the powers conferred by the Constitution; and these are the same over the whole land. If they had power to "secure the blessings of liberty" to the people of the United States in the District of Columbia, they had the same in all the States and Territories of the Union. They have no more right to withhold from the executive or from the judiciary the appropriate means of protecting every man against slavery, or of securing to every citizen all the privileges and immunities of citizenship in every State, than

they have to say that they will not, and their successors shall not, "make all laws necessary and proper for carrying into execution all the powers vested in the government, or any department or officer thereof." And they have no more right to say, that the judicial department shall not have jurisdiction over every case,—"all cases arising under this Constitution,"—together with the proper means of executing it, than they have to accomplish either of the other inadmissible purposes.

§ 546. It is the duty of Congress to give effect to the whole constitutional jurisdiction of the department, and so to organize the courts as to render them adequate to its execution. They have no power to curtail or restrict, or otherwise qualify, it in any respect. They may remove or "except" some cases out of the appellate jurisdiction of the Supreme Court, by giving it to some other court of the United States in which the judicial power is vested, but not by abolishing it, or leaving it to be exercised or not by any body else. They may also make "regulations;" that is, prescribe rules by which the jurisdiction shall be exercised, so as to render it efficient and effectual for its purposes, but in no case to limit or obstruct it. To regulate a jurisdiction is to make rules for its exercise.

§ 547. The judicial power is exactly defined, and vested in the courts, by the Constitution; and the only power conferred on Congress by

this clause is to make exceptions to, and regulations for, the appellate jurisdiction of the Supreme Court. If they do neither; the Supreme Court has the whole appellate power by the Constitution. If they make "exceptions," they must give the cases excepted to some inferior court; for the whole "judicial power of the United States shall be vested in the Supreme Court, and in such inferior courts as Congress may . . . ordain and establish." If they make "regulations," the jurisdiction must be exercised according to the rules so prescribed; otherwise, the jurisdiction must be exercised in conformity to such rules as the court itself may prescribe, according to law.

§ 548. It is proper, though perhaps unnecessary, to remark, that this commentary on the first and second sections of the third Article has been made on the plain and obvious meaning of the words of those sections, as they stand in the Constitution, irrespective of any practice of the government on the subject in its past history. It was the policy of the earliest administrations not to subject the machinery of the new government at once rashly to a full head of steam. This was for the double purpose of not exposing the public tranquillity to any unnecessary strain, by suddenly adopting too many new measures and novel appliances to the daily avocations and internal relations of the people, and of gaining time for themselves from the immediate pressure

of the external relations of the country, in which they found themselves deeply involved, for the full consideration and experience necessary to enable them rightly to understand, and wisely to adapt, all the powers of the new Constitution to meet the wants and answer the expectations of the people of the United States.

§ 549. The same policy was continued under succeeding administrations, for the less honorable purpose of prolonging the imbecility of the general government; and leaving to the subordinate governments the entire management of those peculiar domestic institutions and aristocratic usages and assumptions, which the "justice," "welfare," and "liberty" of the people required and enjoined the national government to control and rectify. Thus it has happened, that the third department of the government has never been organized in a manner to render it competent and fully adequate to the exercise of "the judicial power of the United States," which is vested in it by the Constitution.

§ 550. This is painfully evident at the present moment (1866), when the government has no other means than its military power for securing to its own citizens life, liberty, or property in those places where the State governments have been disorganized, or are unable or unwilling to administer the laws of the United States, and "establish justice;" for which purpose, among others, the government itself was ordained by

the American people. The statutes seem to have been framed upon the mistaken theory of conferring only such jurisdiction as they pleased, where they pleased, rather than of making "exceptions" to, and "regulations" or rules for, the exercise of the appellate power, as already conferred; and then constituting "tribunals inferior to the Supreme Court" for the exercise of the remaining "judicial power of the United States."

§ 551. For instance, the first judicial Act passed Sept. 24, 1789, is entitled "An Act to establish the judicial courts of the United States;" apparently forgetting that the Supreme Court was established by the Constitution, and, if it was not, that no power was given to Congress to establish one, but only "to constitute tribunals inferior to the Supreme Court." And again, by the thirteenth section of the statute, "The Supreme Court shall have appellate jurisdiction from the circuit courts, and courts of the several States, in the cases hereinafter specially provided for." Which cases so provided for are far within the boundaries of the Constitution, which extends their appellate jurisdiction to "all cases within the judicial power of the United States," except those whereof they have original jurisdiction, and such other "exceptions" only as "Congress shall make."

§ 552. All our judicial legislation has been formed upon the same model; and Congress, instead of doing the only things they were au-

thorized to do on this subject, — to wit, to make "exceptions" to, and rules or regulations for, the exercise of the appellate jurisdiction of the Supreme Court, and "to constitute inferior tribunals" for the residue of the "judicial power of the United States," — have assumed to dole out from time to time, both to the Supreme and inferior courts, only a miserable pittance of the jurisdiction actually vested in them by the Constitution. This course is doubly injurious to the people and their government. If Congress considered the whole judicial power vested, as it is, in the Supreme and inferior courts, and proceeded, in the exercise of their constitutional duty, to make "exceptions" from the appellate jurisdiction of the Supreme Court, they must necessarily provide for its exercise by some inferior court by them constituted, so that the independence and integrity of the judicial department might not be infringed.

§ 553. But, by assuming that the jurisdiction of the courts is only by legislative grant, they not only degrade the character of the judiciary as a co-ordinate department of the government, but they absolutely throw away so much of "the judicial power of the United States" as they fail to provide the means of exercising. In this manner a large proportion of "the judicial power of the United States" has been, and is to this day, practically abrogated and annulled, by the neglect of Congress "to make all laws [or any

laws] necessary and proper for carrying [the whole of it] into execution." Whatever is done in virtue of the Constitution or by its authority, directly or indirectly, is said, in legal language, to be done under the Constitution; in the same manner as an authority given by law is said to be exercised under the law.

§ 554. There must be a constitutional way to execute the Constitution, for the people made it to be executed; and, whenever a dispute or difference arises about any thing done or omitted by virtue of its provisions, it is said to arise under the Constitution; and this whether the authority in question is more nearly or more remotely derived from it. The States themselves only exist, as political bodies, under and by virtue of the Constitution of the nation; and their governments have no authority or power independent of their recognition by the United States as subordinate republics and parts of the nation. They can have no independence or sovereignty while remaining in the Union.

§ 555. They are not known or recognized by the law of nations, or any other law but the Constitution of the United States, and cannot be while they are a part of it. There is no such thing as a nation within a nation. If such a dispute or difference assumes the form of an action, civil or criminal, in law or equity, it becomes a "case" within the meaning of the 2d section of Article III., and so within

"the judicial power of the United States." As the Constitution expressly recognizes and adopts the law of nations, the common law, and the admiralty and maritime law, as parts of the law of the land, it would seem that cases arising under those laws, within the jurisdiction of the United States, were necessarily included in the judicial power, as arising under the Constitution and laws of the United States. Such, we have seen by the Proclamation of April 22, 1792, was the understanding of the first administration of our government. It was the understanding of the judiciary also, as is manifest by the numerous charges delivered by them to the grand juries about that time, in relation to violations of the law of nations, when no statute existed defining or punishing such violations. Such would seem also to have been the understanding of the legislative department.

§ 556. In the Judiciary Act of Sept. 24, 1789, where the inferior courts are constituted in obedience to the Constitution, it is enacted, section 9, "That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts or upon the high seas," where only certain punishments are to be inflicted; "and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction,

. . . within their respective districts, as well as upon the high seas; . . . and shall also have cognizance, concurrent with the courts of the several States or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States; and shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, &c.; and shall also have jurisdiction, exclusive of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid." By section 11 it is enacted, "that the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, &c.; and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except," &c.

§ 557. This statute was passed at the first session of the first Congress under the Constitution, as a part of the organization of the government, before the United States had any jurisprudence, civil or criminal, or any code of law or equity, other than the Constitution and the laws recognized, continued, and adopted by it. "Cognizable under the authority of the United States," is only a statute substitute for the constitutional

phrase, within "the judicial power of the United States." What then, were, the "crimes and offences," and "the suits of a civil nature, at common law or in equity," "cognizable under the authority of the United States," or within "the judicial power of the United States"? Undoubtedly just what they are now, — "all cases in law and equity arising under this Constitution, the laws and treaties of the United States." The United States had then no "law or equity," but what was created or continued by the Constitution.

§ 558. There were no statutes rendering a man liable to prosecution, judgment, and punishment, criminally or civilly, for any act whatever; defining the injuries which might be remedied by public prosecution or private suit, or prescribing any mode by which either could have been incurred or pursued. No previously existing law or right or duty was repealed or abrogated by the Constitution, but such as were so impliedly, by being superseded, or rendered incompatible with it. The law of nations, the common law, the admiralty and maritime law, and a few Congressional ordinances, were expressly or impliedly recognized and continued in force, and were so treated by the new government. The common law is so in this very definition of "the judicial power," as well as in divers other places. "Law and equity" are two distinct systems of jurisprudence, known only to and by the com-

mon law; and this judicial Act, in pursuance of the same idea, speaks expressly of the "common law and equity" as different rules of decision in cases within the judicial power of the United States.

§ 559. Independent of any statute jurisdiction, as soon as an inferior court was instituted, all the judicial power of the United States was vested, by the Constitution, in its own courts; the inferior court taking all that the Supreme Court could not. What was "cognizable under the authority," or within "the judicial power," of the United States, was settled by the Constitution, and the whole of it vested ["shall be vested"] in its courts. When the legislature had, in obedience to the Constitution, instituted a court or courts for that portion of the judicial power which was denied to the Supreme Court, viz., all the original jurisdiction of the government, except "in cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party," — what authority had they to go further, and say that the courts thus constituted should not execute the power?

§ 560. All that seemed to be required of Congress was "to constitute such tribunals inferior to the Supreme Court," as were appropriate to the duty; and, when they had made an admiralty court and a common-law court, if it was found that their duties were too arduous or in danger of interfering, then to make such new distribu-

tion, regulation, or additional provision as the case might require. But that the admiralty court could not take the admiralty jurisdiction, and the common-law court could not take the common-law jurisdiction, both civil and criminal, expressly vested in the courts of the United States by the Constitution, without further statute authority, would be likely to appear as obscure and mystical logic as it appeared to Mr. Justice Story and Chancellor Kent.[1]

§ 561. A different view of the subject, however, was early inaugurated, and, in accordance with the wishes of those who favored the general purpose of reducing the prerogatives of the nation to the lowest possible fraction, and leaving every thing to depend on the local agencies, was brought into practical operation, and, without examination, has been successfully retained to the present time. The case of the United States *v.* Hudson & Goodwin[2] was a political case, involving a most important constitutional principle, decided without argument, with little apparent judicial examination, by a divided court, and in recognized accordance with prevailing popular clamor. Mr. Justice Johnson, who delivered the short opinion, says, "We consider the question as having been long since settled in public opinion." He also mentions "the prevalence of opinion in favor of the negative of the proposition;" and states the question thus:

[1] 1 Gal. R., 488; 1 Kent's Com., 320. [2] 7 Cr. Rep., 32.

"Whether the circuit courts can exercise a common-law jurisdiction in criminal cases?" He adds, that he "states it thus broadly, because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute."

§ 562. So, though the "question" is very broad, the "decision" is to be much broader than the question. The case presented only a prosecution for libel. The "question," as stated, applied to any criminal prosecution at common law. But the "decision" was intended to apply, and does apply, so far as it is considered a valid exposition of the Constitution, not to criminal cases only, but to civil cases; and not only to those arising under the common law, but to all cases, civil or criminal, in law or equity, arising under this Constitution, the law of nations, the admiralty and maritime law, or any other law except statute law. That portion of the court who concur with Judge Johnson in this opinion, and who are not named, ground it entirely on this assumption, that the inferior courts constituted by Congress "possess no jurisdiction but what is given them by the power that creates them."

§ 563. The Constitution says,[1] the inferior courts, with the Supreme Court, shall have the whole "judicial power of the United States;" and then proceeds to define accurately the portion belonging to the Supreme Court, which

[1] Article III., section 1.

certainly Congress could not increase, "and of which," this opinion says, with as near an approach to accuracy as would comport with the association, "the legislative power cannot deprive it."[1] It is, then, as certain as logic, that, by the Constitution, these Congressional tribunals, whether one or more, must possess all "the judicial power of the United States," except what belongs to the Supreme Court. The doctrine, according to the two statements, stands thus: By the Constitution, the inferior tribunals shall have all "the judicial power of the United States," but what is vested in the Supreme Court. By this decision, they shall have "no jurisdiction but what is given them by" Congress. This comes as near to a direct contradiction in terms as would be consistent with judicial courtesy and official decorum. As to authority, as the last was only authorized by a part of the court, the Constitution may perhaps, at some future time, be allowed to prevail.

§ 564. Four years afterwards, in 1816, the question was again presented to the court, in the case of the United States *v.* Coolidge.[2]

[1] We have seen, however, that, by the 13th section of the Judiciary Act, Congress attempted, and probably with success, to restrict the appellate jurisdiction of the Supreme Court (which by the Constitution extends to all cases in law or equity, civil or criminal, within the judicial power of the United States, and not included in their original jurisdiction) to appeals "from the circuit courts and courts of the several States, in the cases hereinafter specially provided for;" which may be few or many, and increased or diminished at the pleasure of the legislature.

[2] 1 Wheat. R., 415.

Mr. Justice Johnson then said for the court, "Upon the question . . . a difference of opinion has existed, and still exists: . . . we should, therefore, have been willing to have heard the question discussed." But the defendant did not appear, and the Attorney-General declined to argue it, as his predecessor had done in the former case. "Under these circumstances," continued the judge, "the court would not choose to review their former decision." The learned and elaborate opinion of Mr. Justice Story in the circuit court [1] was thus overruled, on the sole authority of the former case, without an additional sentence of reasoning to the meagre page in that case, by a divided court, and again without argument or examination. The court plainly invited an argument, and almost intimated a wish to abandon the narrow ground of the former opinion. But it was manifest, that the Administration, represented by the Attorney-General, did not favor it, and the court would not volunteer a review of the question.

§ 565. So it has stood for fifty years, and so it stands to-day, without an effort on the part of any branch of the government to change it. Thus the government, in the same spirit and for the same purpose that it has neglected and declined to exercise many of its important powers for the benefit of the people, has absolutely disclaimed and abjured all power to "secure the

[1] 1 Gal. Rep., 483.

blessings of liberty," and practically abrogated and thrown away a large proportion of their power and duty to "establish justice." As the laws now stand and are construed by themselves, their own judges have no legal protection for life, liberty, property, or reputation, in the performance of their official duties in their own circuits; their citizens are said to be shot down in their own dwellings, almost daily in some places, with impunity, and without any provision of judicial remedy; and even their executive officers, civil and military, soldiers, agents, servants, and citizens of all grades, are held liable to be politically disfranchised, persecuted, and outlawed, by the agents of subordinate local governments, for fidelity and loyalty to the Union; and all this not only without trial and punishment, but without even a liability to the legal right of complaint and judicial examination under the national authority.

§ 566. Chancellor Kent, in commenting on the case last cited, says, "The admiralty jurisdiction of the Federal courts is derived expressly from the Constitution; and criminal cases belonging to that jurisdiction by the common law, and by the law of nations, might have been supposed to be cognizable in the admiralty courts, without any statute authority. If the common law be a rule of decision in the exercise of the lawful jurisdiction of the Federal courts, why ought it not to apply to criminal as well as to civil cases,

and upon the same principle, when jurisdiction is clearly vested?"

§ 567. What he says of the admiralty jurisdiction is equally true of all the other jurisdiction of the Federal courts, and his pungent question, *mutatis mutandis*, equally applicable to all other cases coming within it. It will be difficult to give a satisfactory answer to that question. If the courts should take the jurisdiction thus conferred, without further legislation, they "would," he continues, "of course, in the description, definition, prosecution, and punishment of the offence, be bound to follow those general principles and usages which are not repugnant to the Constitution and laws of the United States, and which constitute the common law of the land, and form the basis of all American jurisprudence."[1]

§ 568. In the case of Robinson *v.* Campbell,[2] the Court say, that "the remedies in the courts of the United States are to be at common law or in equity, . . . according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." The jurisdiction of all cases, civil and criminal, at common law and equity, coming within the judicial power of the United States, is contained in the same grant; and the same principles ought to govern its exercise. It may be hoped, that,

[1] 1 Kent's Com., 320. [2] 3 Wheat. Rep., 212.

under better auspices, a more liberal construction of the judicial power than has heretofore been given may yet ultimately prevail, for the establishment of "justice," and the security of "the blessings of liberty" "to ourselves and our posterity." Cases arising under "the laws of the United States," have been substantially restricted to the narrow limits of the legislative Acts of Congress, as though the nation knew, and the Constitution recognized, no other law.

CHAPTER XXIX.

THE STATES.

§ 569. The Constitution having been ordained and established by the people of the United States, for themselves and their posterity, as the supreme law for the whole land and every part thereof, and made fully adequate to the preservation and perpetuation of the Union, — that is, to its own preservation and defence, — and to provide for all the other exigencies of government specially mentioned therein; and having authorized and required the different departments of its government to make, apply, and execute "all laws necessary and proper" for the accomplishment of those purposes, — it follows inevitably, that there can be no other supreme law or independent sovereignty within its domain. The subdivisions actually existing, or recognized and authorized by the Constitution, are States, Territories, governmental district, fortresses, dockyards, &c.; over all of which, as component parts of the United States, the Constitution extends equally.

§ 570. But the right of citizens to participate in the government by the elective franchise, is reserved exclusively to those who are also citizens of some particular State, in distinction from those who belong to other parts of the country. This was not because all those parts were expected to become States, for some of them never could, consistently with the purpose for which they were held; nor because the citizens, as such, had not equal rights with all others: but because the Territories, which alone were capable of ever becoming States, had neither the population nor the organization necessary to enable them to perform the duties, or exercise the privileges, of States; and it was provided, that, when they were so, they might be admitted thereto under the Constitution.

§ 571. The original States were admitted, by name, to a participation in the government by an express provision of the Constitution itself, if they chose to accept it, by a vote of their people adopting that instrument. They were not compelled to perform the duties of States, without the voluntary consent of the people; neither were they absolved from their relations to the nation or its government, whether they chose to participate therein or not. The Territories, also, under proper circumstances, had the same right, and the same freedom from compulsion, by solemn compact[1] with the old government,

[1] Ordinance of 1787.

which the new government was required to fulfil,[1] though the appropriateness of the circumstances must be submitted to the discretion of Congress.[2] It is obvious that a popular government, — a government by the people, — a republican government, in fact, cannot be sustained in a State entirely by external agency. If a competent portion of the people are not capable, morally, intellectually, and physically, to administer such a government under the Constitution, the necessary consequence is, that, as they must be governed, they must all be subjects, and not participants.

§ 572. This view of the subject attracted early attention, when the Constitution was before the people for their adoption. Nine States were required to put the government in operation, and eleven actually did so. It became a prominent inquiry among the opponents, what would be their condition in a dissenting minority? and the friends of the Constitution refused to discuss it, because, they said, it was a delicate question. But why was it a delicate question? It might soon become practical, and, if it did, would be very important. It was delicate in reference to the pending action. Their object was to induce every State voluntarily to adopt it; and to announce, beforehand, what would be the consequences of a refusal, might be construed into a threat, and so obstruct the attainment of the

[1] Article VI., section 1. [2] Article V., section 3.

desired object. Therefore, our fathers refused to discuss the question hypothetically.

§ 573. Rhode Island was not even represented in the Convention, and, with North-Carolina, refused, till after the government went into operation, to participate in it. There is little room for doubt, that New York and Virginia would have done the same, if, by their refusal, they could have defeated the measure.[1] But they hesitated to be left in that position. Both Rhode Island and North Carolina were component parts of the nation, and had been from the first formation of the Union in 1774; and no practical statesman will admit for a moment that they could have been permitted, by a permanent refusal to take part in the new government, to constitute themselves independent foreign nations in the heart of the Republic. They must necessarily submit to the government of the country, whether they participated in it or not. This rendered the question, in the beginning, an extremely delicate one for the friends of the Constitution, though the obvious answer to it had doubtless a commanding influence in the end. It will have a similar influence in the future, if there is virtue enough in the government and people to remain firm and faithful to themselves and to the Constitution of their adoption.

[1] It is true, that the fact that New Hampshire, the ninth State, had adopted the Constitution five days before, was not positively known in Virginia at the moment of taking the final vote; but it was known that such a result was not doubtful.

§ 574. In this manner the original States, having local governments already established under the auspices of the United States, came under the Constitution, by the legal and voluntary action of the people adopting it, and thereby annulling every thing in their own institutions and laws incompatible with it. Future States should be received in a similar manner, whether formed from unorganized territory or from States disorganized by rebellion, — with this difference, that as in this last case there is no existing local government through which the will of the people can be lawfully expressed and certified, it becomes proper, if not essential, that preliminary steps for that purpose should be authorized by the general government. The idea of a State, whether under the Constitution or outside, involves the necessity of territory, population, and government, — all equally and absolutely essential. The first two may be said to constitute the body, and the last the head, which is as necessary to the body politic as it is to the natural body; for in either case, if the head is off, the body is dead.

§ 575. In regard to population and territory, for a State in the Union, no qualifications are mentioned; even proximity or juxtaposition is not expressly prescribed. But in regard to government the qualifications are specially prescribed; so that a State in the Union may as well exist without territory or population, as without

government; and without any government, as well as with a monocracy or any other different from what the Constitution requires. A community without this cannot be entitled to the privileges and immunities of a State, or exercise the rights or perform the duties of a State in the Union; not because they are not in the Union, but because they are not a State, and cannot be, till they have a constitutional government, legally approved, and voluntarily adopted and administered by the people, or so many of them as the government may adjudge it safe to recognize and trust as such. Until so admitted to a participation in the government, every part of the national domain is subject to the exclusive legislation of Congress, guided by the principles of the Constitution, and controlled by the purposes expressly announced in its introductory and enacting clause.

§ 576. Adequate provision was made for the voluntary admission of every State that had been previously authorized or recognized by the Revolutionary government, and for the future formation and admission of similar organizations under the authority of Congress. But no provision was made for any independent organization within the United States. Even the Indian tribes, though excused from the duties of citizens while retaining their tribal relations, are subject to the government, and have been so treated, sometimes with great injustice. Still they must

be governed; and, if they will not govern themselves in accordance with the peace and welfare of the citizens of the United States, they nevertheless, from necessity, will be governed, as they must, or exterminated. If any others are inclined to place themselves in the same predicament, by making themselves savages, they — "may profit by the example."[1]

§ 577. When the people of the original States adopted the Constitution, they voluntarily became subject to it, with such qualification and curtailment of their own, as that instrument, and "all laws necessary and proper for its execution," might require. Those which have been or may be admitted afterwards, where the qualification and curtailment are not superseded, as they always should be, by express limitations of their own, are received on the same terms, because they could not be received without them. In all other respects, the original States are in the same relative position to the United States as they occupied when the Constitution was formed. The subsequent States are just where the Constitution placed them, at their own request.

§ 578. This brings us to the inquiry, What was legally the political condition of individual States in the Union, when the Constitution was made?

This may be answered generally, by saying it

[1] Patrick Henry.

was then just what it was when those States, as Colonies, were first organized under the Union. The division of the British empire rendered the people of the American Union just as much a sovereign and independent nation as it left the people of the European portion. The only difference was, that they had the government, and we had none. They retained it because it acted with them, and we rejected it because it acted against us. By the cotemporaneous series of acts by which the British empire was divided, the American people adopted and established for this country such an informal, unlimited, and extemporaneous government as suited the exigencies of the time, by a general representation of the people, chosen on Revolutionary principles, without previous law or regard to time, place, or circumstance, other than the mere facility of congregation, regardless of corporate rights, or minor local divisions. No delegate of the first Congress pretended to an authority to represent or bind any organized general convention of the body politic of a whole colony. No such convention existed in any colony, or could have been formed without the agency of a previous government. The king's governors called only for a partial representation, carefully excluding, when they could, those places from which they expected representatives they did not want. So that, if the legally chosen delegates had revolted in a body and united in a convention, the mass

of the people would have been incompetently represented.

§ 579. The Continental Congress, however, supplied, as well as it might, the place of the royal government in England; but the people soon felt the want of those domestic institutions they had enjoyed by virtue of the king's charters, though they granted no power to do any thing inconsistent or incompatible with the "laws of this our realm of England." To satisfy this want, the "United Colonies, in Congress assembled," authorized and "recommended to the Provincial Convention of New Hampshire . . . to call a full and free representation of the people; and that the Representatives, if they think it necessary, establish such a form of government as in their judgment will best produce the happiness of the people, and most effectually secure *peace and good order* in the province, during the continuance of the present dispute between Great Britain and the Colonies."[1] Such resolutions carried with them no other authority than the adoption of temporary substitutes for the extinct colonial or provincial governments, and equally subordinate and subsidiary to the general government and laws of the country, whatever they might be. Some of them were merely a continuation, under the Congress, of the former colonial governments, and none of them

[1] Resolve of Nov. 3, 1775, respecting a government for New Hampshire.

contained any more independence or sovereignty than the colonial charters.

§ 580. When peace became more hopeless, and some local governments were still not properly organized, Congress "recommended to the respective assemblies and conventions [not the people] of the Colonies, . . . when no government sufficient for the exigencies of *their affairs* hath been already established, to adopt such government as shall, in the opinion of the *representatives* of the people, best conduce to the happiness and safety of their *constituents in particular*, and America in general." That this did not confer or recognize any independence, sovereignty, or supremacy on the respective colonies, is manifest from several considerations. 1. Its language does not purport to do any such thing. 2. The United Colonies, at that time (May, 1776), had nothing of the kind themselves to concede to any body. They even nominally, for two months longer, admitted their own subordination, and did not proclaim their final separation and independence of the government of Great Britain. 3. It obviously recognizes the integrity of the whole, and of course the sectionality and dependence of the particular parts. 4. That the individual colonies themselves so understood it, is manifest from the fact, that every government so formed recognized, in some form, this position, as a part only of the country, and subordinate to its government. This posi-

tion was never changed by the people of the United States, and could not be changed by any other power.

§ 581. In the year 1781, seven years after the formation of the Union, and five years after the final declaration of the independence and sovereignty of the nation, these local governments adopted among themselves a treaty or league, called a Confederation, — a sort of "Holy Alliance," — in which neither the people of the United States nor the people of the individual States were named as parties, or ever became such by any formal act. By this alliance they assumed that each State had, individually, complete "sovereignty, freedom, and independence;" and that "the United States in Congress assembled," under whose government they were constituted, organized, and defended, had no "power, jurisdiction, or right, which is not by this Confederation expressly delegated" to them, — thus making themselves supreme, and the general government subordinate, and dependent in all things upon the local legislatures. "The thing framed said to him that framed it, he had no understanding." It is manifest that no such procedure as this could have any tendency to change the legal relation between the people of the United States or their government, and the local governments they had invited and allowed to be organized within and under their jurisdiction. Their rights and duties, as the legitimate

successors and inheritors of the national sovereignty, with those of the government they then had or any other they might afterwards form, remained precisely the same as though the State legislatures had not confederated. Such a combination could neither increase their own powers, nor diminish those of the United States.

§ 582. Though the league was of no validity, as against the people of the United States or their government, yet, as the delegates in Congress had usually been members of the State governments, were elected and paid by them, and not unfrequently in sympathy with them, they conformed to it, as far as possible, till its unfitness for their use was fully demonstrated. So far as it respected the only parties to it, — the State legislatures, — there is no doubt the treaty was a valid contract, there being then no law against it. What each one bound itself to, with respect to the others, it could not rightfully depart from. This league undertook to make a distribution of all governmental powers. What the parties assigned to themselves or each other is of no consequence, because of no authority. But what they agreed among themselves did not belong to them, or any of them, but did belong to the United States, and bound themselves to each other that none of them should claim or exercise, they could not afterwards assume, *ipsis judicibus*, as rightfully belonging to them, and so "reserved" to them by the Constitution, even

if any of such powers had been vested in them prior to that contract. This excludes from any pretence of reservation to the State governments, all the powers abjured by them, or assigned to the United States by the Confederation. None of them had, in fact, ever belonged exclusively to the State governments; but, if they had, they could not any longer, without a violation of that solemn compact.

§ 583. Among the rights accorded to the United States by this league, were the following: 1. To have a Congress for the "management of the general interests of the United States." 2. Freedom of debate for the members of Congress, and exemption from arrests and imprisonments during its session. 3. All expenses for the "common defence or general welfare," shall be defrayed out of a common treasury, supplied by the States as apportioned to them. 4. Determining on peace or war. 5. Sending and receiving ambassadors. 6. Treaties and alliances. 7. Rules for captures on land or water. 8. Distribution of prizes. 9. Granting letters of marque and reprisal in times of peace. 10. Trial of piracies and felonies on the high seas. 11. Courts for appeals in all cases of captures. 12. Determining all disputes between two or more States. 13. All controversies concerning right of soil claimed under grants from two or more States. 14. To regulate the alloy and value of coin. 15. Fixing the standard of

weights and measures. 16. Regulating trade with the Indians. 17. Establishing post-offices. 18. Appointing officers for and regulating the land and naval forces. 19. "To ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same; to borrow money or emit bills on the credit of the United States; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota." 20. Every State shall abide by the determination of the United States in Congress assembled, on all questions hereby submitted to them.

§ 584. By the same treaty of Confederation, the State legislatures laid themselves under sundry restrictions and disabilities, from which they could not be absolved without the consent of the other parties: —

1. No State shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with, any king, prince, or state.

2. No two or more States shall enter into any treaty, confederation, or alliance whatever between them.

3. No State shall lay any imposts or duties which may interfere with any stipulations in treaties.

4. No vessels of war shall be kept up in time of peace by any State.

5. Nor shall any body of forces be kept up in any State in time of peace.

6. No State shall grant commissions to any ships or vessels of war, or letters of marque and reprisal.

§ 585. These, and many other powers of the general government and disabilities of the local legislatures, were not new, but had been practised, or well understood, from the foundation of the American Union. But they were introduced into this league of confederation for the double purpose of being claimed as grants or concessions of the State governments, and of being rendered, in a great measure, nugatory, as they were, by exceptions, qualifications, and limitations, that destroyed all efficiency in the government, and brought it to a speedy stand. Though by these operations the legal *status* of the people of the United States or their government had not, in respect to the local jurisdictions, been actually changed; yet it was found necessary, in order to preserve the Union and prevent a total abolition of the government, to resort to an entirely new organization. This was most providentially effected by the people, in peace, with the active co-operation and assistance of all the State legislatures, and the organs of their alliance.

§ 586. Up to this time, though the legal relations of the American Union, both internal and external, remained unchanged, they were actually

unwritten, practically undefined, and essentially unlimited, except by the principles of international and natural law. They made little progress in defining or systematizing them during the War of Independence; and the abortive league of confederation among the subordinate governments made none afterwards. So the Constitution itself was the result of the first and only attempt of the American people to define and limit, by a written fundamental law, the rights and duties of their own government, in relation to every thing within and every thing without its jurisdiction.

§ 587. In respect to all within the United States or any part thereof, whether individuals, communities, corporations, or governments, they have spread over them the broad mantle of the Constitution, subjecting the whole, equally and universally, to the supreme law of the land. All that it says particularly the States shall not do, and all it says more generally shall not be done, it is the business of the government to take care that they are not done. Any one of the least of these disabilities is a perfect negation of all claims to independence, nationality, or sovereignty. Several of them are aimed directly at those attributes.

§ 588. "No State shall enter into any treaty, alliance, or confederation; . . . enter into any agreement or compact with another State or with a foreign power, or engage in a war," &c.

A sovereign and independent State prohibited from quarrelling with its neighbours, or even making peace!! They might as well be required to practise "justice and domestic tranquillity,"—to stay at home and mind their own business. Yet this class of prohibitions deprives the States of no power they ever possessed. We have seen that the State governments themselves, in their confederation league, most elaborately disclaimed the whole of them. Besides these disabilities going precisely to the annihilation of any claim to a *status* among nations, as independent sovereignties by international law, the Constitution imposes many others interfering more directly with the internal administration of interests purely local. Some of these are particular, and apply directly and exclusively to the States; while others are general, in the nature of a declaration of rights, and operate not only as a restraint on the people of the States and their own local governments, but also on the government and people of the whole nation.

CHAPTER XXX.

STATE DISABILITIES.

§ 589. THE disabilities of States, in respect to the domestic affairs of their own localities, specially imposed by the Constitution, are mostly found in the 10th section of Article I. "No State shall . . . grant letters of marque and reprisal." This prohibition is made on account of the danger to which the exercise of such a power would expose the peace of the country, and the international relations of their government. "No State shall . . . coin money." As this power was expressly given to Congress, the restriction prevents any interference by States. "No State shall . . . emit bills of credit." As a State cannot make money, or say what shall be money, so neither can they make or authorize any substitute for money. A bill of credit is a promise to pay money. "In its enlarged, and perhaps literal, sense, the term 'bill of credit,' in the Constitution, may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for borrowed

money."[1] The whole duty of regulating the currency, as an instrument of commerce and a part of the commercial power, is imposed upon Congress; and the States are expressly, as well as impliedly, excluded from it. What they cannot do themselves, of course they cannot authorize others to do for them. Thus far is clear.

§ 590. But what is its bearing upon other assumed powers of the State governments? If the States may contract debt, receive credit, and especially if they may borrow money, they must promise to pay; that is, in some some form or by some token, issue or "emit a bill of credit." This the owner may sell or transfer to his neighbor, and thus it may go into circulation, as a substitute for the money it promises. If it is valid evidence of a legal claim against the State in the hands of the owner, such evidence can be multiplied to any extent, and the prohibition be rendered thereby utterly void. If such evidence, as being issued in direct violation of the Constitution, is inadmissible, and can prove nothing, then the States can have no credit for borrowed money or any thing that requires that kind of proof. This condition of the law would afford the best security for the United States against a liability for the debts of repudiating States. State debts, lawfully contracted and proved, must be paid, because the States are able to pay them. If they may lawfully contract debts, by borrow-

[1] 4 Peters' Rep., 431, Craig *v.* Missouri.

ing money or otherwise, *ad libitum*, the government of the United States is bound by the Constitution to see them paid, because it was ordained on purpose to "establish justice."

§ 591. It is true that individual citizens of domestic or foreign States cannot sue a State of which they are not citizens. But citizens of the United States, who are not at the same time citizens of a State other than the one prosecuted, may do so; or at least they are not within the terms of the prohibition in the eleventh Amendment. This includes citizens of the same State, and citizens of the Territories, of the District of Columbia, and all other places not belonging to any particular State. More than this, domestic or foreign States may become the owners of such debts, or assume the enforcement of them on behalf of their own injured citizens, and would have a right to demand the assistance of the Supreme Court for the purpose. Foreign states, indeed, might decline to ask or rely on any such assistance, but undertake the direct enforcement themselves, in the manner lately resorted to by France against Mexico.[1] In such a case, as the United States would be bound to protect the defaulting State "against invasion," they would have only the alternative of paying the just debt, or assum-

[1] "Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as a probable source of hostility." — "The denial or perversion of justice by sentences of courts, is with reason classed among the just causes of war." — *Federalist*, Nos. 7 and 80, by Hamilton.

ing an unjust war in favor of the wrongdoer; which would be much worse in principle, and more injurious in interest.

§ 592. "No State shall . . . make any thing but gold and silver coin a tender in payment of debts." To make any thing a legal tender, is to require it to be received as money, where money is due; and this is only in another form to say what shall be money, — that is, to coin it. As the States cannot do this, so neither can they dispense with it, nor make any substitute for it. Congress are not restricted, in making, adopting, and fixing the value of money, to the use of any particular description of materials; but the States, in making tender laws, are restricted to the coin or authorized money of the United States, and to that portion of it manufactured from gold and silver.

§ 593. "No State shall . . . pass any . . . law impairing the obligation of contracts." Mr. Madison says of such laws, with others in the same connection, they "are contrary to the first principles of the social compact, and to every principle of sound legislation."[1] The prohibition is taken substantially from the Ordinance of 1787, as drawn by Mr. Dane, where the words are "interfere with or affect private contracts." The change is significant. "Interfere with or affect" might extend to any act that should touch or relate to this contract. But to "im-

[1] Federalist, No. 44.

pair the obligation," means only to weaken the force or efficacy of the contract. Leaving out the qualifying word "private," makes the prohibition apply to all contracts. Thus the Supreme Court say,[1] "The words are general, and are applicable to contracts of every description." They have been judicially applied to contracts between individuals, between States, and between States and individuals; to State grants of every kind,—of land, easements, privileges, and franchises; and for all sorts of purposes and uses, whether mercantile, agricultural, manufacturing, educational, or eleemosynary. In fact, to almost every conceivable contract in the power of the State or people to make, except their own Constitutions.

§ 594. To prevent the violation of these, to the detriment of individual rights, by the State itself, or by any department of its government, the courts of the United States have never been called upon to interfere, under the authority of this restriction. Civil rights of great importance and value are acquired, vested, and held under these constitutions, and are afterwards taken away, lost, or impaired by adverse unconstitutional State action, under the forms of law, without restraint or redress. Why an appeal should not be made to the supreme judicial power of the nation for redress under this provision, is not readily perceived. That State

[1] 6 Cranch's Rep., 187.

constitutions are contracts in their nature, will hardly be denied. They are usually so called on their face. Chief Justice Jay said,[1] "Every State constitution is a compact, made by and between the citizens to govern themselves in a certain manner." The constitution of Massachusetts asserts that "the body politic . . . is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws." They therefore "ordain and establish" . . . the constitution, which they call "an original, explicit, and solemn compact with each other." All the State constitutions purport expressly to be founded on the consent, agreement, or compact of the people, and are thus made contracts in form as well as in substance. If they are contracts at all, they must be contracts of some *description;* and if the prohibition of our Constitution is "applicable to contracts of *every description*," of what description must those contracts be, to which it does not apply?

§ 595. "Whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law cannot divest those rights, or annihilate or impair the title so acquired." A constitution is a law, and if an authorized repeal of it by the whole people cannot impair rights held under it, much less can

[1] 2 Dallas's Rep., 419.

an unauthorized violation of it by any department of its government. It is difficult to see why a private vested right, when attempted to be impaired in this manner, should not be protected under the authority of this prohibition by the general government, whose duty it is to execute the Constitution. It is no answer to say, even if it could be proved, that such a result was not in contemplation when the Constitution was formed. "Although a rare or particular case may not of itself be of sufficient magnitude to induce the establishment of a constitutional rule, yet it must be governed by that rule when established, unless some plain and strong reason for excluding it can be given." A constitutional bill of rights is a grant, recognition, or assurance to individuals, of the rights therein contained; and, like any other grant, is a contract executed, and an extinguishment of the right of the grantor, and implies a contract not to re-assert that right.[1] The Constitution says that a State shall not impair the obligation of contracts, and the Supreme Court have authority to enforce the prohibition.

§ 596. "No State shall . . . pass any bill of attainder, *ex post facto* law, . . . or grant any title of nobility." These are repetitions of what had been more generally prohibited before, and have already been sufficiently remarked upon. "No State shall . . . lay any imposts or duties

[1] See 3 Story's Com., 258; 6 Cranch's Rep., 135; 1 Kent's Com., 392.

on imports or exports;" or "lay any duty of tonnage;" or "keep troops or ships of war in time of peace." It is added in regard to these, and some others, "without the consent of Congress;" but this neither increases nor diminishes the force of the restriction; for whatever Congress may lawfully do directly, on any of these subjects, they may doubtless do indirectly, that is, consent to their being done by the State legislatures, if they so choose.

§ 597. Besides the foregoing particular and express restrictions on the States or their governments, the Constitution contains many others, relating to matters purely internal, applying more indirectly, perhaps, and not exclusively, to the States, but still equally including them and all others subject to the Constitution. Whatever the Constitution contains is the supreme law of the land, and binds everybody that is under the law. This class of disabilities extends to all general inhibitions of acts in derogation of recognized rights, and all negations or affirmations in the nature of a declaration of rights. Saying that a thing shall not be done, that is otherwise within the scope of legislative power, State or national, operates essentially a constitutional disability on all governments and people within its jurisdiction.

§ 598. Instances under this head include such subjects as the following: The privilege of members of Congress from arrest; the suspension

of the writ of *habeas corpus;* the compensation of the President; the trial of all crimes by jury; the requirement of two witnesses for conviction of treason; attainder of treason not to work corruption of blood or forfeiture after the death of the traitor; the faith and credit to be given to public acts and records of other States; the privileges and immunities of citizenship; the extradition of fugitives from justice; the discharge of fugitives from labor; the support of republican government; the invalidity of any State law contrary to "the law of the land."

§ 599. Many subjects are similarly restricted in the constitutional amendments of which the following are examples: The free exercise of religion; freedom of speech; freedom of the press; the right of the people to assemble and petition the government; the right of the people to keep and bear arms; the right of the people to be secure in their persons, houses, papers, and effects; the legality of warrants upon probable cause, supported by oath, &c.; indictments only by a grand jury; only once in jeopardy of life or limb, for the same offence; no one compelled to be a witness, in a criminal case, against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation; the right of trial by jury in suits at common law involving over twenty dollars. All these and some other provisions are in the

nature of a bill of rights, sanctioned by the Constitution, and are, by necessary implication, so many restrictions on all power, wherever lodged. A few only are particularly applied to Congress; but it is not to be supposed that this was intended to be exclusive, or that the people of the United States meant to have their rights exposed to depredations from others, after protecting them against their own government. The acknowledged constitutional rights of the people must be protected by the government, not only against their own wrongdoing, but against any other agency in the land. The government has as much right to put a citizen to the rack in order to compel him "to be a witness against himself," as it has to permit a village magistrate to do the same thing, under the pretended authority of a State law. And so of every other prohibition in the catalogue.

§ 600. These are the disabilities and restrictions imposed on the States, by the terms of the Constitution. They were always in view during the early discussions of the relative rights of State and nation, when it was well understood and recognized, that the Constitution left the States with all the legal rights they then had, except those that were altered by that instrument. It was known that no new powers of government were conferred on the States, and that all its legislative powers were vested in Congress. It was also perfectly and equally

well known to all concerned, that the whole object of the American people, in ordaining and establishing the Constitution, was to constitute a firm national government, adequate to all the exigencies of a government for the United States, "in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty" to all the people of the United States and their posterity. All this was true, well understood, and plainly and permanently written on parchment. But the future was unseen, and necessarily left out of the account. It could not have been foreseen, that a system of false doctrine and antagonistic practice, leading to, and terminating in, treason, rebellion, and war, would be adopted by a portion of the subordinate States, the result of which might be the total annihilation, or any thing short of it, of all those States.

§ 601. The avowed purposes of the people of the United States, for which the Constitution was established, they had made it the duty of their government to accomplish, by all the means placed at their disposal. These means were, the making and executing of "all laws necessary and proper" for that end. Whatever laws may be properly made by one department, must be lawfully executed by the other departments; and whatsoever the government, or any department or officer thereof, may lawfully do or com-

mand for any of those purposes, no man may lawfully undo or counteract. This constitutes the sweeping and all-pervading restriction and disability of every citizen and subject within the Union, the States inclusive. This is the supremacy of the Constitution, and, with the laws and treaties of the United States, forms the paramount "law of the land," binding all officers and judges, States, corporations, and people, "any thing in the constitution or laws of any State to the contrary notwithstanding."

VIVAT RESPUBLICA.

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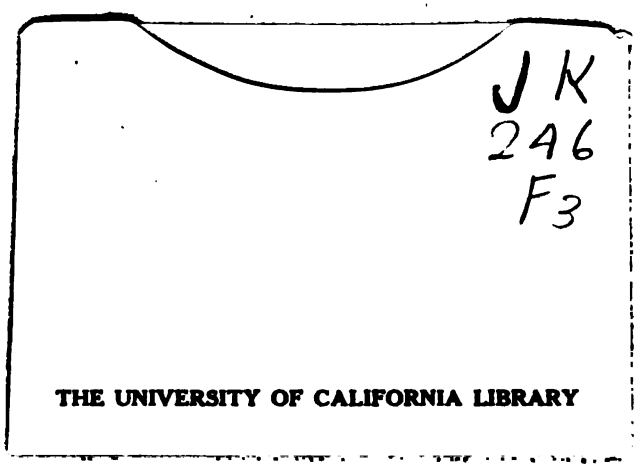
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